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**Supreme Court of the United States**

OCTOBER TERM, 1951

**No. 224**

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, CAPITAL TRANSIT COMPANY AND WASHINGTON TRANSIT RADIO, INC.,  
PETITIONERS,

*vs.*

FRANKLIN S. POLLAK AND GUY MARTIN

**No. 295**

FRANKLIN S. POLLAK AND GUY MARTIN,  
PETITIONERS,

*vs.*

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, CAPITAL TRANSIT COMPANY AND WASHINGTON TRANSIT RADIO, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 224—PETITION FOR CERTIORARI FILED AUGUST 3, 1951

No. 295—PETITION FOR CERTIORARI FILED AUGUST 30, 1951

CERTIORARI GRANTED OCTOBER 15, 1951

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 224

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, CAPITAL TRANSIT COMPANY AND WASHINGTON TRANSIT RADIO, INC.,  
PETITIONERS,

vs.

FRANKLIN S. POLLAK AND GUY MARTIN

No. 295

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PETITIONERS,

vs.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, CAPITAL TRANSIT COMPANY AND WASHINGTON TRANSIT RADIO, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
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IN THE  
**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 10,777

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FRANKLIN S. POLLAK, GUY MARTIN, *Appellants,*

v.

PUBLIC UTILITIES COMMISSION OF THE  
DISTRICT OF COLUMBIA, ET AL., *Appellees.*

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Appeal from the United States District Court for the  
District of Columbia

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**JOINT APPENDIX.**

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Filed Jul 5 1950

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1655-50

POLLAK, ET AL., *Plaintiffs,*

v.

PUBLIC UTILITIES COMMISSION, ET AL., *Defendants.*

Civil Action No. 1694-50

TRANSIT RIDERS ASSOCIATION, *Plaintiff,*

v.

PUBLIC UTILITIES COMMISSION, ET AL., *Defendants.*

Civil Action No. 1716-50

PAUL NATHANIEL TEMPLE, *Plaintiff,*

v.

PUBLIC UTILITIES COMMISSION, ET AL., *Defendants.*

**Opinion of Court**

TAMM, J: I will pass on the motions at the present time.

Consolidated for the purpose of argument before the Court today are motions to dismiss filed by the Public Utilities Commission, the Capital Transit Company and the Washington Transit Radio, Incorporated, in actions entitled Pollak, et al. v. Public Utilities Commission, Transit Riders' Association v. Public Utilities Commission, and Temple v. Public Utilities Commission.

There are several points with reference to the status of the individual plaintiffs that arise, particularly in the cases of Transit Riders Association v. Public Utilities Commission and Temple v. Public Utilities Commission, upon which the Court does not believe it is necessary to pass at this

time because of the Court's desire to treat the motions upon what appears to the Court a fundamental point that is common to all three cases.

The Court, as I indicated at the opening of this hearing this morning, has spent the better part of several days reviewing the memorandum of points and authorities submitted by counsel representing the parties in all three cases. The Court has reviewed the vast majority of the cases cited by counsel in connection with their positions on the various motions. The Court has reviewed the basic law, starting with the statute under which the action was  
4 taken, and going back to determine what constitutes the right of privacy on which a person believing his right of privacy would be predicated may bring suit.

The Court from its study of all the facts and elements of these cases is of the opinion that basically there is no legal right of the petitioners in any three of these cases which has been invaded, threatened or violated by the action of the Public Utilities Commission and, accordingly, the Court will grant the motion of the Commission to dismiss in all three cases.

Mr. Segal: If the Court please, this may be in excessive caution, but, sometimes it is necessary to give notice of appeal as provided for by the statute.

The Court: It isn't necessary. Counsel will submit the necessary orders.

### CERTIFICATE OF COURT REPORTER

I, Ralph E. Minier, an official reporter for the United States District Court for the District of Columbia, do hereby certify that the foregoing is the official transcript of the Opinion of the Court in the above-entitled actions.

RALPH E. MINIER,  
*Official Court Reporter.*

Filed Apr 13 1950

IN THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA

Civil Action No. 1655 '50

FRANKLIN S. POLLAK, *Petitioner*

1333 - 27th Street, N. W.

Washington 7, D. C.

and

GUY MARTIN, *Petitioner*

3117 Woodley Road, N. W.

Washington 8, D. C.

Against

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA

and

JAMES H. FLANAGAN, GORDON R. YOUNG and KENNETH W.  
SPENCER, constituting the Public Utilities Commission  
of the District of Columbia, *Respondents*

**Petition of Appeal by Franklin S. Pollak and Guy Martin  
From Order No. 3612 of the Public Utilities Commis-  
sion of the District of Columbia, Dated December  
19, 1949.**

Franklin S. Pollak and Guy Martin (hereinafter called the "petitioners"), pursuant to the provisions of paragraph 65 of Section 8, Chapter 150, Act of March 4, 1913, 37 Stat. 974; as amended, now District of Columbia Code (1940) Sections 43-704 and 43-705, file this joint petition of appeal from Order No. 3612 of the Public Utilities Commission of the District of Columbia (hereinafter called the "Commission"), dated December 19, 1949, and each for himself says:

6      1. By its Order No. 3560, dated July 14, 1949, the Commission ordered "that an investigation be made



to determine whether or not the installation and use of radio receivers on the street cars and busses of Capital Transit Company is consistent with public convenience, comfort and safety; and that a formal public hearing be held upon the subject of the investigation at a time to be fixed by notice of hearing." Pursuant to notice of hearing dated September 19, 1949, a public hearing on the subject of the investigation was held on October 27, 28 and 31, and November 1, 1949.

2. By orders of the Commission at the opening of the hearing the petitioners were severally granted leave to intervene in the proceeding.

3. Following the close of the hearing the petitioners, on November 23, 1949, filed a joint brief with the Commission, in which they prayed for an order prohibiting the reception of radio broadcasts in the vehicles of Capital Transit Company, and for other relief. That brief is incorporated herein by reference.

4. By its Order No. 3612 of December 19, 1949, hereby appealed from, the Commission stated its conclusion that the installation and use of radios in street cars and busses of Capital Transit Company is not inconsistent with public convenience, comfort and safety, and ordered that the investigation initiated by Order No. 3560 be dismissed.

5. Petitioners were then and have ever since been obliged to use the street cars and busses of Capital Transit Company in connection with the practice of their profession and on other occasions and are thereby subjected against their will to the broadcasts in issue. These broadcasts make it difficult for petitioners to read and converse and deprive them of their privacy. For these reasons the petitioners were at the time of the said Order No. 3612 and have ever since been affected by that order.

6. Pursuant to Paragraph 64 of Section 8 of the aforesaid Act, the petitioners filed with the Commission on January 18, 1950, an Application for Reconsideration and Other Relief and a Supplementary Application for Recon-

sideration and Other Relief, both of which are herein incorporated by reference.

7. By its Order No. 3631, dated February 15, 1950, the Commission denied the petitioners' Application and Supplementary Application for Reconsideration and Other Relief.

8. Pursuant to Paragraph 65 of Section 8 of the aforesaid Act, the petitioners assign the following as grounds and reasons for this appeal from the said Order No. 3612:

A. The Order appealed from recites, under the heading "Conclusion", that the installation and use of radios in streetcars and busses of Capital Transit Company "is not an obstacle to safety of operation"; that "public comfort and convenience is not impaired and that, in fact, through the creation of better will among passengers, it tends to improve the conditions under which the public ride"; and that for these reasons it "is not inconsistent with public convenience, comfort and safety.". The Order contains no

8 subsidiary findings of fact and it contains no findings of fact whatever except in so far as the aforesaid "Conclusion" may be considered a finding of fact.

In failing to contain subordinate findings of fact the Order is unreasonable, arbitrary and capricious and in violation of the requirements of paragraphs 65 and 66 of Section 8 of the aforesaid Act.

B. Petitioners' brief filed November 23, 1949, contained twenty-nine separately numbered paragraphs of proposed findings of fact. They related, respectively, to the following matters:

(1) The business and monopoly position of Capital Transit Company.

(2) Its contract with Washington Transit Radio, Inc., for the installation of radio receivers and broadcasting services.

(3) The number of radio receivers installed.

(4) The contract of Washington Transit Radio, Inc., with the operator of Station WWDC-FM for broadcasting to the receivers.

(5) The date of beginning of the broadcasts to the vehicles and their daily hours.

(6) The content of the programs broadcast.

(7) Institutional or promotional announcements broadcast to the vehicles at the request of Capital Transit Company.

(8) The sale and purchase, for private profit, of time for commercial announcements on these programs.

9 (9) The nature of the installations in the vehicles and the impossibility of escaping the sound of the broadcasts within the vehicles.

(10) The irrelevance of the possible payments to Capital Transit Company above the minimum guarantee.

(11) The insignificance of the guaranteed minimum payments by Washington Transit Radio, Inc., to Capital Transit Company in relation to Capital Transit Company's gross transit revenue—\$0.0007 per cash fare and \$0.009 per weekly pass.

(12) The fact that hundreds of thousands of persons are daily compelled to use Capital's vehicles.

(13) Surveys of riders' reactions to these broadcasts in April and October 1949.

(14) Percentages of objectors as shown by these surveys.

(15) Percentage of those who did not favor these broadcasts as shown by the October survey.

(16) The objections stated in the April and October surveys.

(17) The omission, from the questionnaire used in these surveys, of any question asking those favoring these programs whether they would forego them if a minority objected.

(18) The grounds of objection stated at the hearing herein.

10 (19) The intensity of the objectors' opposition.

(20) The survey of operators' opinion in October 1949 and what it showed.

(21) Reasons for thinking that this survey may not reflect the full extent of operator opposition.

(22) The impossibility of shutting off the sense of hearing.

(23) The estimate that at least 15,000 passengers each week-day object to these radio programs.

(24) Serious mental and physical injury to a number of riders will result from these programs on the basis of present installations.

(25) The harm to riders will be increased if radio receivers are installed in all 15,000 vehicles.

(26) The programs are a danger to public safety, because of their effect on some operators.

(27) These petitioners are compelled to ride in vehicles of Capital. The broadcasts interfere with their reading and conversing and deprive them of their privacy.

(28) The riders on Capital's vehicles, other than chartered busses, are a captive audience. Capital's contrasting treatment of chartered busses, as to which it has competition.

(29) The harm done to objectors exceeds the good done to supporters.

11 Each of the proposed findings is supported by substantial evidence. All but a very few of them are unopposed by any evidence whatever, and none is opposed by substantial evidence. The Order appealed from discusses none of the proposed findings, mentions none of them and adopts none of them, and is, therefore, arbitrary, capricious and unreasonable.

C. The "Summary of Testimony" in the Order appealed from is not, and does not purport to be, a finding of fact. It is incomplete, incorrect, misleading, arbitrary, capricious and unreasonable, biased and prejudiced and contrary to the law and facts of the case.



D. The Order appealed from is unlawful in that it "dismissed" the investigation without stating in the ordering portion the Commission's ultimate finding on the subject of the investigation.

E. The Order recites that "the investigation conducted and the evidence presented . . . must, of necessity, be considered by this Commission strictly in the light of its jurisdictional powers". Nothing in the Order states explicitly what the Commission means by this statement nor to what contentions it is addressed, but, read in conjunction with the rest of the Order, this statement is manifestly a ruling that the points of law made by the petitioners are beyond the Commission's jurisdictional powers in this proceeding. In so ruling, the Commission erred as a matter of law.

F. The Order does not consider the merits of any of the points of law made by the petitioners or by the other parties to the proceeding. It does not discuss a single court decision, prior Order of the Commission, statute or regulation cited by the petitioners or any other party. It thus erred as a matter of law.

G. The Order does not refer to any rule of law or legal authority whatever. It thus erred as a matter of law.

H. The Order is arbitrary, capricious and unreasonable and otherwise unlawful in that it is contrary to the following rights, duties, liabilities and legal authorities, each one of which was urged by the petitioners and each one of which requires a holding that the broadcasts are contrary to public convenience, comfort and safety:

(1) The right of objecting riders, under the First Amendment to the United States Constitution, to listen or not to listen, and to read or not to read.

(2) The right of objecting riders, under the Fifth Amendment to the United States Constitution, not to be deprived of their liberty (privacy, and leisure and health), without due process of law and not to have their private property (time and health), taken for private use or without compensation.



(3) The duty of a common carrier to take extra care for the protection of riders known to be more susceptible to injury than the majority of passengers.

(4) The liability for the physical consequences of emotional distress intentionally and unreasonably caused.

13 (5) The liability of a common carrier to its customers for injury caused to them upon its land by any natural or artificial condition, known to the common carrier, which it is reasonably necessary for the public to encounter in order to secure its services.

(6) The rule that in such a case as this the "public" is injured if a significant minority is injured.

(7) The right of privacy.

(8) The Police Regulations of the District of Columbia, Article VI, Sections 1 and 2, which prohibit the use within the District of Columbia of any "mechanical device . . . or instrument for intensification of the human voice or of any sound or noise for advertising purposes." Under Paragraph 90 of Section 8 of the aforesaid Act the Commission has the duty of enforcing compliance with these regulations.

(9) The Commission's Orders No. 683 of September 29, 1927 and No. 711 of June 19, 1928, requiring that the noise incident to the operation of street cars and busses shall be kept to a minimum and prohibiting any "material change in equipment" without prior approval by the Commission of the plans and specifications therefor. No such approval has been requested or given in this case.

(10) The prohibition, in the aforesaid Act, of any unjust, unreasonable or discriminatory service, act or practice and of a greater charge, or demand for a greater compensation, than is specified in a rate schedule on file.

14 (11) The provision of the Joint Resolution of January 14, 1933, that all of Capital Transit's powers shall be exercised subject to the supervision of and regulation by the Commission as provided by law.

(12) The provision of the Capital Transit's corporate charter, which are such that its participation in the arrangements for these broadcasts is *ultra vires*.

I. The Order is unreasonable, arbitrary and capricious and otherwise unlawful in approving a larger number of installations than had been made at the time of the hearing.

J. The Order is arbitrary, capricious and unreasonable and otherwise unlawful in that it did not direct a reopening of the hearing for the admission of newly available evidence, as set forth in the petitioners' Application and Supplemental Application for Reconsideration.

K. The Order is arbitrary, capricious, unreasonable and otherwise unlawful in not granting the petitioners' request to amend the Order of Investigation so as specifically to invoke all of the Commission's statutory powers referred to by the petitioners and so as to raise thereunder all questions relevant to the propriety of these broadcasts.

L. The Order is arbitrary, capricious and unreasonable and otherwise unlawful (a), in determining that the installation and use of radio receivers is not inconsistent with public convenience, comfort and safety, (b) in failing to determine the contrary, and (c) in failing to prohibit such installation and use.

15 M. The Order is arbitrary, capricious and unreasonable and otherwise unlawful in failing to define precisely what it approved; in failing to state that authorization of additional installations is without prejudice to later review by the Commission; and in failing to state that the authorization does not relate to installation in terminal facilities, waiting rooms, and division headquarters.

N. By its conduct of the hearing generally, and its exclusion of evidence thereat, by its orders and their contents, by its manner of disposing of the contentions of the petitioners, by its total failure to develop the legal rights of members of the public and the medical aspects of the case, and by its total failure to call for independent expert testimony on the public-opinion surveys, the sound levels, and other matters, and in other ways, the Commission has demonstrated bias and prejudice in favor of the broadcasts, and its Order is unreasonable, arbitrary, capricious, biased and prejudiced.

Wherefore the petitioners pray:

1. That the Court determine and declare that the Commission erred in ruling in effect, that the points of law made by the petitioners are beyond the Commission's jurisdictional powers in this proceeding; and instruct the Commission as to its jurisdictional powers.

2. That the Court determine and declare that the Commission erred in totally failing to consider the merits of the points of law made by the petitioners or by the other parties to the proceeding, and in totally failing to consider or mention the court decisions, prior orders of the Commission, statutes and regulations cited by the petitioners or the other parties to the proceeding; and instruct the Commission as to its duty in the premises.

3. That the Court determine and declare that the Commission erred in making its decision without mention of any rules of law or legal authorities; and instruct the Commission as to its duty in the premises.

4. That the Court determine and declare that the Commission erred in upholding none of the petitioners' legal contentions made in their Brief and their Application for Reconsideration and Other Relief, and in failing to uphold all of them; and instruct the Commission that all of these legal contentions are correct and should have been upheld.

5. That the Court determine and declare that the so-called "Summary of Testimony" in the Commission's Order is incomplete, incorrect, misleading, arbitrary, capricious, unreasonable, biased and prejudiced; and instruct the Commission as to its errors therein.

6. That the Court determine and declare that the "Conclusion" set forth in the Commission's Order does not purport to be, and is not, supported by any findings of fact; that it cannot be supported by findings of fact; that it is arbitrary, capricious, unreasonable, biased and prejudiced and contrary to the facts and law of the case; and that, accordingly, the Commission erred in making this conclusion.

7. That the Court determine and declare that the Commission erred in not making any subsidiary findings of fact whatever and in not making any findings of fact of  
 17 any character except in so far as the aforesaid "Conclusion" may be considered a finding of fact; and instruct the Commission concerning its duty to make findings of fact.

8. That the Court determine and declare that the Commission erred by not incorporating in the ordering portion of its order its ultimate finding on the subject of the investigation; and instruct the Commission as to its duty in the premises.

9. That the Court determine and declare that each of the proposed findings of fact requested by the petitioners is supported by substantial evidence, which in most cases is uncontradicted; that none of them is opposed by any substantial evidence and almost all of them by no evidence whatever; that in failing to make the findings of fact proposed by the petitioners the Commission's Order is arbitrary, capricious, unreasonable, biased, prejudiced and otherwise unlawful; and the petitioners pray the Court to instruct the Commission to make each of the findings of fact proposed by the petitioners.

10. That the Court determine and declare that the Commission erred in not finding that the installations and use of radio receivers in the street cars and busses of Capital Transit Company is inconsistent with public convenience, comfort and safety; and instruct the Commission that the facts of record and the law applicable to the issues require a finding by the Commission that the installation and use of radio receivers in the street cars and busses of Capital Transit Company is inconsistent with public convenience, comfort and safety.

11. That the Court determine and declare that the Commission erred in not prohibiting the installation and  
 18 use of radio receivers in the street cars and busses of Capital Transit Company; and instruct the Com-



mission that it is its duty to prohibit such installation and use.

12. That the Court vacate the Commission's Order No. 3612.

Petitioners further pray for the following relief in case the Court should consider (contrary to the petitioners' contentions), that there are any questions of fact in this case requiring further consideration by the Commission:

13. That the Court determine and declare that the Commission erred in not granting petitioners' request, as set forth in their Application for Reconsideration and Other Relief, that the Commission, on notice to Capital Transit Company and Washington Transit Radio, Inc., amend its Order of Investigation so as to invoke all of the powers of the Commission referred to in the discussion in that Application of the Commission's jurisdiction and so as to raise under such powers all questions bearing on whether the broadcasts should be approved; and instruct the Commission to proceed accordingly.

14. If it should be the Court's view that the Commission (contrary to its Order herein and contrary to petitioners' contentions herein), could properly attach any significance to the possibility of payments by Washington Transit Radio, Inc., to Capital Transit Company over and above the minimum guarantee of six dollars per radio-equipped vehicle per month, then, in that case, we pray the Court (a) to determine and declare that the Commission erred in excluding at the hearing evidence tendered by the petitioners with reference to the present and future earnings of the radio station from these broadcasts, and (b) to instruct the Commission to reopen the hearing to receive evidence concerning such earnings.

15. If it should be the view of the Court (contrary to the Petitioners' contentions), that the number of those favoring these broadcasts, as shown by the public-opinion surveys in evidence, can be regarded by the Commission as significant for the disposition of the case, then, in that



event, we pray the Court (a) to determine and declare that the Commission erred in not granting petitioners' request for a reopening of the hearing to permit the petitioners to introduce evidence attacking the public-opinion surveys and showing that they overstated the extent of support for the broadcasts and (b) to instruct the Commission to reopen the hearing for that purpose.

16. If it should be the view of the Court (contrary to the petitioners' contentions), that the testimony of Mr. McIntosh, notwithstanding opposing testimony, can be regarded by the Commission as supporting a decision in favor of continuance of the broadcasts, then, in that case, petitioners pray the Court (a) to determine and declare that the Commission erred in not granting petitioners' request for a reopening of the hearing to permit the petitioners to introduce evidence along the lines of Dr. Heilprin's affidavit of January 17, 1950 and (b) to instruct the Commission to reopen the hearing for that purpose.

17. If it should be the view of the Court (contrary to the petitioners' contentions), that the Commission may properly attach any significance, for the disposition of this case, to the testimony by Mr. Giddings, Vice-President of Capital Transit Company, that the drivers of the vehicles are authorized to turn the receivers off "when they consider that

it is too loud", then, in that event, petitioners pray  
20 the Court (a) to determine and declare that the Commission erred in not granting the petitioners' request for a reopening of the hearing to permit the petitioners to introduce evidence to the contrary as shown by the statement of Mr. Merrill, President of Capital Transit Company, quoted in Mr. Seelig's affidavit of January 16, 1950; and (b) to instruct the Commission to reopen the hearing accordingly.

18. If it should be the view of the Court (contrary to the petitioners' contentions), that the Commission could in some event make findings warranting it in permitting the

continuance of the broadcasts, then, in that event, petitioners pray the Court (a) to determine and declare that the Commission erred in not granting petitioners' request that the Commission in that event by order (i) define precisely what is approved, stating, among other things, permissible types of programs, the limits on the length and frequency of commercials, the limits on the boosting of the loudness of all portions of the broadcasts, and the plans and specifications of the speakers and receivers, and (ii) authorize only the number of installations actually made at the time of the hearing, and (b) to instruct the Commission that any order by it permitting the continuance of the broadcasts would have to contain the provisions so requested by the petitioners.

And the petitioners pray for such other and further relief as to the Court may seem proper.

Respectfully submitted,

FRANKLIN S. POLLAK  
GUY MARTIN

April 23, 1950

22

Filed May 2 1950

### **Motion to Dismiss by Capital Transit Company**

Capital Transit Company moves the Court to dismiss the appeal herein on the grounds that:

1. The petition of appeal fails to show that petitioner is a person or corporation affected by the orders of the Commission appealed from;
2. The Court lacks jurisdiction of the subject matter of the appeal for the reason that the orders appealed from are not subject to review under Section 43-705, D. C. Code, 1940;
3. The reasons for the appeal set forth in the petition

of appeal are insufficient to state a claim upon which relief can be granted.

Dated at Washington, D. C. this 2nd day of May, 1950.

EDMUND L. JONES  
Colorado Building  
Washington, D. C.

F. G. AWALT  
DARYAL A. MYSE  
822 Connecticut Avenue,  
N. W.  
Washington 6, D. C.

*Attorneys for Capital  
Transit Company.*

23

Filed May 2 1950

**Motion to Dismiss by Washington Transit Radio, Inc.**

Washington Transit Radio, Inc. moves the Court as follows:

1. To dismiss the appeal on the ground that the Court lacks jurisdiction because the petitioners are not persons or corporations affected by any final order or decision of the Commission and because the appeals fail to state a justiciable controversy.
2. To dismiss the appeal because the petitioners fail to state a claim upon which relief can be granted.

Dated at Washington, D. C. this 2nd day of May, 1950.

W. THEODORE PIERSON  
VERNON C. KOHLHAAS  
PIERSON AND BALL,  
1007 Ring Building,  
Washington 6, D. C.

*Attorneys for Washington  
Transit Radio, Inc.*

27

Filed Jun 1 - 1950

**Order Granting Intervention.**

This cause coming on to be heard upon the motion of Capital Transit Company for leave to intervene herein as a party respondent, and the Court having considered said motion and the pleading tendered therewith, and it appearing to the Court that Capital Transit Company should be permitted to intervene as prayed in said motion, and the Court being duly advised in the premises, it is, by the Court this 1st day of June, 1950,

ORDERED, that Capital Transit Company be and it is hereby granted leave to intervene in this cause, and it is hereby made a party to this cause, and to that end the intervenor's motion to dismiss annexed to the said motion to intervene is hereby considered and stands as a motion to dismiss by Capital Transit Company.

EDWARD A. TAMM  
Judge

28

Filed Jun 2 - 1950

**Order Granting Intervention.**

This cause coming on to be heard at this term of court upon the motion of Washington Transit Radio, Inc., for leave to intervene herein as a party respondent, and the Court having considered said motion and the pleading tendered therewith, and it appearing to the Court that the said Washington Transit Radio, Inc., should be permitted to intervene herein as prayed in said motion, and the Court being duly advised in the premises, it is, by the Court, this 1st day of June, 1950,

Ordered, that Washington Transit Radio, Inc., be and it is hereby granted leave to intervene in this cause, and it is hereby made a party to this cause, and to that end may file a motion or pleading in this cause in the same manner

and with like effect as if named as an original party in this cause.

That this order is to be without prejudice to any proceeding heretofore had in this cause.

EDWARD A. TAMM  
*Judge*

29

Filed Jun 15 1950

### **Order Dismissing Petition of Appeal**

Upon consideration of the motion of the respondent Public Utilities Commission in the above-stated action to dismiss the petition of appeal, and after hearing oral argument of all the parties, it is by the Court this 15th day of June, 1950,

ORDERED that the motion of the Public Utilities Commission of the District of Columbia to dismiss the petition of appeal be, and it is hereby, granted and that the said petition of appeal be, and it is hereby, dismissed.

EDWARD A. TAMM  
*Judge*

30

Filed Jun 15 1950

### **Order Dismissing Petition of Appeal**

Upon consideration of the motion of the intervenor Capital Transit Company in the above-stated action to dismiss the petition of appeal, and after hearing oral argument of all the parties, it is by the Court this 15th day of June, 1950,

ORDERED that the motion of the Capital Transit Company of the District of Columbia to dismiss the petition of appeal be, and it is hereby, granted and that the said petition of appeal be, and it is hereby, dismissed.

EDWARD A. TAMM  
*Judge*



31

Filed Jun 15 1950

**Order Dismissing Petition of Appeal.**

Upon consideration of the motion of the respondent, Washington Transit Radio, Inc. in the above-stated action to dismiss the petition of appeal and after hearing the oral argument of all the parties, it is by the Court this 15th day of June, 1950,

ORDERED that the motion of Washington Transit Radio, Inc. to dismiss the petition of appeal be and it is hereby granted and that the said petition of appeal be and it is hereby dismissed.

EDWARD A. TAMM

*Judge*

32

Filed Jul 14 1950

**Notice of Appeal to the United States Court of Appeals for the District of Columbia Circuit.**

Notice is given that Franklin S. Pollak and Guy Martin, the petitioners, appeal to the United States Court of Appeals for the District of Columbia Circuit from the orders of June 15, 1950, dismissing their petition of appeal.

PAUL M. SEGAL

HARRY P. WARNER

QUAYLE B. SMITH

*Attorneys for Franklin S.  
Pollak and Guy Martin*

SEGAL, SMITH & HENNESSEY  
816 Connecticut Avenue  
Washington 6, D. C.

July 14, 1950

Filed Aug 1 1950

**Amended Statement of Points.**

The appellants<sup>2</sup> state that the points on which they intend to rely on the appeal in this matter are as follows:

A. The Court erred in granting the several motions to dismiss on the ground "that there is no legal right of the petitioners . . . . which has been invaded, threatened or violated by the action of the Public Utilities Commission, . . . .".

40 B. The Court's error was in its failure to recognize and give effect to the certain rights, privileges, duties and liabilities which exist as a matter of law, and which entitled the petitioners to prevail on an appeal from the questioned order of the Public Utilities Commission.

C. The order in question authorized and approved the imposition by Capital Transit Company of a requirement that one must hear certain music, advertisements and announcements put out over loud speakers as a condition to riding on the streetcars and busses of Capital Transit Company.

D. The rights, privileges, duties and liabilities referred to are:

(1) The right of objecting riders, under the First Amendment to the United States Constitution, to listen or not to listen, and to read or not to read.

(2) The right of objecting riders, under the Fifth Amendment to the United States Constitution, not to be deprived of their liberty (privacy, and leisure and health), without due process of law and not to have their private property (time and health), taken for private use or without compensation.

(3) The duty of a common carrier to take extra care for the protection of riders known to be more susceptible to injury than the majority of passengers.

(4) The liability for the physical consequences of emotional distress intentionally and unreasonably caused.

41 (5) The liability of a common carrier to its customers for injury caused to them upon its "land" by any natural or artificial condition, known to the common carrier, which it is reasonably necessary for the public to encounter in order to secure its services.

(6) The rule that in such a case as this the "public" is injured if a significant minority is injured.

(7) The right of privacy.

(8) The Police Regulations of the District of Columbia, Article VI, Sections 1 and 2, which prohibit the use within the District of Columbia of any "mechanical device . . . or instrument for intensification of the human voice or of any sound or noise for advertising purposes." Under Paragraph 90 of Section 8 of the aforesaid Act the Commission has the duty of enforcing compliance with these regulations.

(9) The Commission's Orders No. 683 of September 29, 1927 and No. 711 of June 19, 1928, requiring that the noise incident to the operation of streetcars and busses shall be kept to a minimum and prohibiting any "material change in equipment" without prior approval by the Commission of the plans and specifications therefor. No such approval has been requested or given in this case.

(10) The prohibition, in the Act of March 4, 1913 (37 Stat. 977, Ch. 150. § 8, Par. 2), of any unjust, unreasonable or discriminatory service, act or practice and of a greater charge, or demand for a greater compensation, than is specified in a rate schedule on file.

(11) The provision of the Joint Resolution of January 14, 1933, that all of Capital Transit's powers shall be exercised subject to the supervision of and regulation by the Commission as provided by law.

(12) The provisions of the Capital Transit's corporate charter, which are such that its participation in the arrangements for these broadcasts is *ultra vires*

PAUL M. SEGAL

HARRY P. WARNER

QUAYLE B. SMITH

816 Connecticut Avenue

Washington 6, D. C.

*Attorneys for the plaintiff*

August 1, 1950

UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

No. 10777

FRANKLIN S. POLLAK and GUY MARTIN, *Appellants*

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA  
and

JAMES H. FLANAGAN, GORDON R. YOUNG and KENNETH W.  
SPENCER, constituting the Public Utilities Commission  
of the District of Columbia, *Appellees*

**Statement of Contents of Appendix.**

To: Vernon E. West and Lloyd B. Harrison, Esqs.  
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Attorneys for Washington Transit Radio, Inc.

The parts of the record which the appellants propose to print in the appendix to their brief pursuant to Rule 16 are:

1. Opinion of the Court below (pp. 3 and 4).
2. Petition of appeal filed April 13, 1950, by Franklin S. Pollak and Guy Martin from Order No. 3612 of the Public Utilities Commission of the District of Columbia, dated December 19, 1949 (pp. 5 to 20, inclusive).
3. Motion to dismiss filed by Capital Transit Company May 2, 1950 (p. 22).
4. Motion to dismiss filed by Washington Transit Radio, Inc., May 2, 1950 (p. 23).
5. Motion to dismiss filed by the appellees May 3, 1950 (p. 24).
6. Order of the Court below granting the motion of John O'Dea, People's Counsel, to intervene, filed May 10, 1950 (p. 26).
7. Order granting intervention by Capital Transit Company, filed June 1, 1950 (p. 27).
8. Order granting intervention by Washington Transit Radio, Inc., filed June 2, 1950 (p. 28).
9. Order dismissing petition of appeal on motion of the appellees, filed June 15, 1950 (p. 29).

10. Order dismissing petition of appeal on motion of Capital Transit Company, filed June 15, 1950 (p. 30).
11. Order dismissing petition of appeal on motion of Washington Transit Radio, Inc., filed June 15, 1950 (p. 31).
12. Notice of appeal to this Court, filed July 14, 1950 (p. 32).
13. Amended statement of the points on which the appellants intend to rely, filed August 1, 1950 (pp. 39 to 42, inclusive).
14. This notice.

PAUL M. SEGAL  
HARRY P. WARNER  
QUAYLE B. SMITH

816 Connecticut Avenue  
Washington 6, D. C.  
*Attorneys for the  
appellants*

September 19, 1950

### **Proof of Service.**

DISTRICT OF COLUMBIA: ss

Today I mailed a copy of the foregoing to:

Vernon E. West and Lloyd B. Harrison, Esqs.  
District Building  
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John O'Dea, Esq.  
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Washington 6, D. C.

Attorneys for Washington Transit Radio, Inc.

HARRY P. WARNER

Signed and sworn to before me September 18, 1950.  
My commission will expire November 15, 1952.

EDITH Z. MILLER  
*Notary Public*

## PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA.

Order No. 3560.

July 14, 1949.

In the Matter of Radio Reception in Busses and Street Cars  
of CAPITAL TRANSIT COMPANY.

P. U. C. No. 3490/1, Formal Case No. 390.  
C. A. 1655-50, C. A. 1694-50, C. A. 1716-50.

**Order of Investigation.**

Capital Transit Company has embarked upon a program of installing radio receivers in a certain number of its street cars and busses. It is anticipated that by August 15, 1949, approximately two hundred (200) of such installations will have been completed.

The Commission has received a number of communications protesting the use of radios on the vehicles of the Company. Therefore,

IT IS ORDERED:

That an investigation be made to determine whether or not the installation and use of radio receivers on the street cars and busses of Capital Transit Company is consistent with public convenience, comfort and safety; and that a formal public hearing be held upon the subject of the investigation at a time to be fixed by notice of hearing.

A True Copy:

By the Commission:

E. J. MILLIGAN,  
*Executive Secretary.*

(SEAL)

N. H. HETZEL,  
*Chief Clerk.*

ebm



PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA.  
WASHINGTON 4, D. C.

September 19, 1949.

In the Matter of Radio Reception in Busses and Street Cars  
of CAPITAL TRANSIT COMPANY.

P. U. C. No. 3490/1, Formal Case No. 390.

C. A. 1655-50, C. A. 1694-50, C. A. 1716-50.

**Notice of Hearing.**

By its Order No. 3560; dated July 14, 1949, this Commission ordered that an investigation be made to determine whether or not the installation and use of radio receivers on the street cars and busses of Capital Transit Company is consistent with public convenience, comfort and safety. The Commission also ordered that a formal public hearing be held upon the subject of the investigation at a time to be fixed by notice of hearing.

Pursuant to Order No. 3560, notice is hereby given that a formal public hearing will be held upon the above-captioned matter on October 27, 1949, at 10:00 a.m.; in Room 500 of the District Building.

By direction of the Commission.

E. J. MILLIGAN,  
*Executive Secretary.*

jb

**Excerpts from Testimony and Proceedings.**

5 **Lorane T. Johnson** was called as a witness and having been first duly sworn was examined and testified as follows:

*Direct Examination*

Captain Johnson: I merely have the statistical data involving accidents on streetcars and busses and we will state the position of the Police Department in this matter.

Chairman Flanagan: Go right ahead.

Captain Johnson: Since the 1st of July, to date, there have been 180 street cars involved in traffic accidents of which 26 were equipped with radios. Over the same period of time there were 125 busses involved, six of which were equipped with radios. The total number of accidents during that same period of time was 4,007. Since the 1st of January there have been 57 traffic fatalities, ten of which have been caused or involved streetcars and seven of which involved busses. Only one of those 17 was radio-equipped at that time.

The Department is neutral insofar as the equipment of vehicles with radios is concerned.

Chairman Flanagan: Do those statistics have any particular significance to you, Captain?

Captain Johnson: Yes, sir, they indicate to me that the radio-equipped vehicles do not enter into the traffic accident picture at all.

7 William H. Voltz was called as a witness and having been first duly sworn was examined and testified as follows:

*Direct Examination*

Mr. Voltz: My name is William H. Voltz, V-o-l-t-z, Planning Engineer of the Department of Vehicles and Traffic, for the District Government. I represent the Director of the Department of Vehicles and Traffic in this matter and I have a statement here which I would like to read at this time.

In the absence of any evidence that radios in motor vehicles have been a contributing factor in traffic accidents, the Director of Vehicles and Traffic has not deemed it necessary or advisable to recommend to the Commissioners adoption of an amendment to the Traffic and Motor Vehicle Regulations prohibiting the use of radios in motor vehicles. In other words, we do not now consider it to be a traffic matter,

The Department of Vehicles and Traffic's test stations have made a check of the number of motor vehicles equipped with radios. We have found that approximately 47 per cent are so equipped.

Since by law, the Transit Company is required to report to the Public Utilities Commission all accidents involving busses or streetcars, regardless of the nature of seriousness, and since they can readily supply information as to those are radio equipped, it would seem that engineers of the Commission could easily secure data indicating whether or not such devices are hazardous.

**F. A. Sager** was called as a witness and having been first duly sworn was examined and testified as follows:

*Direct Examination*

By Mr. Harrison:

Q. Mr. Sager, will you state your name and position? A. F. A. Sager, Chief Engineer of the Public Utilities Commission.

Q. Has your department made any survey or study to determine whether or not the use of radios on streetcars and busses has resulted in unsafe operation or has resulted in inconvenience to the public? A. Certain simple observations have been made which I will be glad to enumerate.

Q. If you will, please. A. The Engineering Bureau men, including myself, have made trips on radio-equipped busses and streetcars. I will enumerate some of these trips in detail.

One trip that I made sitting on the front seat on the right-hand side of the car, next to the entrance door, was made with the radio on and operating and the volume of the radio tone was such that all of the announcements and music would not be definitely heard at that point.

The volume was so low that no interference was experienced by me or by the driver of the car so far as any requests from those near him were concerned or those outside.

The witness: Now a second trip was made sitting in the seat just in front of the exit door. From that position the radio was also tuned down to approximately the same volume as the one that I just referred to but was perfectly distinct, all the announcements and music could be heard with the exception of certain times when the bus was speeding up and the motor made an undue amount of noise.

In both of those cases it would appear that there was no lack of safety, the operation of the bus could be as safely carried out with as without because at the time of the second observation, conversations were going on, were taking place, between two people in the seat opposite me and those were of about the same volume as the radio at that time.

My conclusion, and this is concurred in by other members of the Engineering Bureau who have made similar trips is that when the radio is operated at the proper volume, at a reasonable volume, enough so that it may be plainly heard by those in the rear of the car, the fact is that it will not be plainly heard in all cases by those sitting in the very front seats of the car but in those cases it is our opinion that there is no question of lack of safety due to the operation of the radio.

The matter of public convenience or public comfort is, I assume, to be developed by testimony of others in this hearing. As for the matter of privacy which has been brought up by some, I wish to make the observation that I do not consider any mass transportation vehicle a vehicle in which privacy can be maintained, or in which privacy exists. You used to have that in mass transportation that is private; that is, the taxicabs, but with the group riding you no longer have privacy and therefore I do not know that the question of privacy enters into the consideration of this question.

In conclusion I must say that personally I don't care for the radio on streetcars but from the standpoint of safety



I can see no objection to it. If there is a slight nuisance value as an advertising medium, there is no more than we bear in cases of other activities or methods that the advertising people have.

By Mr. Harrison:

Q. Mr. Sager, was the sound too loud so that the driver could not observe the stop bell in the vehicle?

12 A. In none of the trips that I have taken, excepting some taken early in the season, at least the middle of the season, August and September, I believe, then the radio was too loud.

Q. Would you say that it was too loud for the driver to observe and hear traffic signals? A. Not in the recent trips, no.

Mr. Harrison: That is all.

Chairman Flanagan: Any other questions?

*Cross-Examination*

By Mr. Shoenfeld:

Q. Would you say that it would interfere with the hearing of the announcement of street stops? A. No. Whether or not you can hear the operator depends entirely upon the operator. Some operator speaks in a way that you can plainly hear just the same as some people here speak plainly and some do not. That is a function of the individual operation. But with the normal tone of voice, the radio has operated on the trips that I have taken recently, it would produce no interference.

Q. Can one equally well hear the announcement of the street stop when there is no interference by the radio advertisements and when there is such an interference? A. Depending on whether there is other interference due to conversations in the car or noises such as street noise,

13 or traffic noise. All of those things may do so.

Mr. Shoenfeld: All of those things may do so.

or cost on the part of the Company. On this basis Mr. Strouse installed a single receiving set in a street car and a single receiver on a bus.

The "music as you ride" bus was operated on various lines at various hours of the day during the week of March 15, 1948 in order to get a cross section of experience. The car was operated on the Mt. Pleasant line during the week of March 22, 1948. During this period the passengers were polled by card as to their reaction to the "music as you ride" program.

At the end of the two-week period the cards were tabulated. They showed that 92 per cent of the bus and street-car passengers preferred "music as you ride." The cards used in the poll were distributed by students of George Washington University. They were tabulated under my supervision.

While the poll clearly indicated public preference for "Music as you ride," we felt the sets had not been perfected sufficiently to place more of them on the vehicles at that time. However, we showed interest in the experiment and on the basis of these tests continued talks with Mr. Strouse. In the meantime other cities were experimenting and the receiving sets were sufficiently improved to warrant further experimental installations.

On February 10, 1949, 10 sets were installed and broadcasting began. By February 18th twenty-one sets were installed, all on busses. As I stated before, the installations have been progressive since that date, the 212th set being installed on September 27th. Special programming began after the first installations.

Q. Will you please tell us the reasons that motivated the "music as you ride" installations beginning with the February 10, 1949, installations. A. There were two reasons: (1) We felt that our passengers would like the diversion of music as they rode, based on the 1948 survey; that it would help them pass the time more pleasantly, and that it would make their ride seem shorter.

(2) Another reason was our operating costs were rising and still are. As a matter of fact we showed deficits in July and August, 1949 and only a small net income in September.

We consider it part of our responsibility in providing good transportation at reasonable rates to explore and encourage every possible means of revenue even though it does not come directly from the rider. The advertising revenue that can be obtained from any "music as you ride" arrangement presents that opportunity. The money earned through this method is credited to our Gross Revenues and thus is reflected in our Operating Income. This relieves the passenger of paying the complete cost of his transit ride to the extent advertising revenues are earned.

In other words, for the privilege of advertising, the advertisers on transit radio help pay the cost of the ride to the transit rider. The earnings from this source we felt had important potentials and in the interest of our passengers we could not ignore it. We felt that we should  
160 take advantage of this means to help relieve the pressing need for more revenue.

Q. Will you please tell us whether or not any contract was entered into with respect to the "music as you ride" installations in Capital Transit vehicles? A. Yes. A contract was entered into between the Capital Transit Company and Washington Transit Radio, Inc.

Q. I hand you a document headed "Agreement" and dated December 13, 1948. Is this document a correct copy of the contract you referred to in your previous answer? A. It is.

Mr. Awalt: Mr. Chairman, may I have this document marked as Company's Exhibit No. 1 for identification?

Chairman Flanagan: It will be so marked.

/Q. Mr. Giddings, will you briefly explain the financial arrangements set forth in this contract, known as Exhibit No. 1? A. Essentially it provides for a mini-  
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37  
mum payment of \$6 per month for each vehicle having a receiving set. As the gross income from advertising rises, the Company proportionately benefits. Inasmuch as this is a new media and is only in its beginning stages, there is no experience as to the ultimate potential return. We feel, however, that it can be very material and substantial if given the opportunity to progress.

Q. Now I understood you to testify that as of September 15, 1949 the total installed sets were 212? A. October 15, Mr. Awalt.

Q. October 15. On this basis, what is your present income from the "music as you ride" installations as of October 15, 1949? A. \$1272 a month or \$15,264 a year. This is based on the minimum \$6 a set as provided in the contract.

Q. Is it the intention of Capital Transit Company to install additional sets in other vehicles not new equipped?

A. Yes. We contemplate eventually a total installation of approximately 1500 sets.

Q. On the basis of 1500 sets, what would be your income from this source at the minimum rate of \$6 per set. A. \$9000 a month or \$108,000 a year.

Q. However, under the contract, I understand you to say that if gross income for advertising rises, the Company would benefit proportionately? A. Yes.

162  
163 Q. Did the Company undertake to further these installations, as far as public acceptance was concerned, on the basis of the survey made by George Washington University Students early in 1948? A. No. Before firming any arrangements with Washington Transit Radio, and with their agreement, we jointly retained Edward G. Doody and Company, an independent research organization, to determine further public reaction. We wanted a survey broad enough to statistically reflect the attitude of all our riders. This was done during the week of April 1, 1949, after the programs had been regularly



broadcast from 7 a. m. to 7 p. m. weekdays and 7 a. m. to 3 p. m. on Saturdays on at least 21 vehicles since February 18, 1949.

The programs were of the same pattern used to-  
 164 day; namely, selected music, news, weather and time reports interspersed with short commercials and public service announcements. The announcements averaged about 6 minutes out of every hour. Our instructions to Doody were specific and with one thought: Do the majority of our riders who have listened to the programs like "music as-you ride" or are they opposed?

Mr. Doody prepared a set of questions which he felt would objectively give us the answer to our questions. We wanted an unbiased answer before proceeding further.

A. Will you please tell us the result of that survey? A. The Doody survey indicated that an overwhelming majority favored "music as you ride."

Q. Following this survey, did your Company come to a conclusion as to further installations? A. Yes. This fact coupled with the substantial financial return which might result and which would be helpful in meeting the costs of providing transportation led us to the conclusion that the installations were in the interest of our patrons.

Q. Did you consider the minority objections to the installations? A. Yes. We realized there would be some objections but we took pains to see that the type of program was one that had good music as a base and of the type which has been suggested by Parent Teacher  
 165 Associations, Women's Clubs and others. The commercials were not to exceed 60 seconds duration and be of a factual character. The news events and time signals are believed to be of general interest to all.

Perhaps, our greatest concentration to meet the possible objections of the minority was the standard set on musical selections. To that end we prevailed upon Washington Transit Radio to secure the transcription library which Muzak Corporation had available for this type of service. We felt in this instance that their long experience, knowl-

edge and reputation in music selection would meet the approval of the minority.

166 Q. Mr. Giddings, can you tell me whether any instructions have been given to the operators to turn off radio sets in any of the vehicles at any time? A. Yes, sir; they have such instructions in the event that they consider the set too loud, that is, playing too loud or something being wrong with it.

Q. Mr. Giddings, did you as vice president of the Capital Transit Company take up with the superintendent or head of the Police Department, the question of the need for a license under the Police Regulations? A. Yes, sir.

Q. What did they advise you? A. They advised me that they felt it was not within their jurisdiction or their responsibility.

*Cross-Examination*

168 By Mr. Pollak:

Q. Is there any other transit company which operates trolleys or busses in Washington to pick up the public in Washington and deposit it in Washington? A. Not to my knowledge. I am sorry, Mr. Pollak, there is one other company that does that.

Q. Which is that? A. The Washington, Marlboro and Annapolis Line.

169 Q. That picks up passengers in Washington and discharges them in Washington? A. Yes, sir.

199 *Redirect Examination*

By Mr. Awalt:

Q. One question, Mr. Giddings. You mentioned the Washington, Marlboro and Annapolis Line, I believe. Do you know whether they have radios on their buses? A. I understand so.

200 **Hulbert Taft, Jr.**, was called as a witness and, after having been duly sworn, was examined and testified as follows:

*Direct Examination*

By Mr. Dowd:

Q. Would you state your name and residence for the record, please? A. Hulbert Taft, Jr., Cincinnati, Ohio.

Q. What is your occupation, Mr. Taft? A. I am executive vice president of Radio Cincinnati, Inc., a company which operates a standard broadcast station, television station, and a transit radio station.

Q. Do you have any connection with Washington Transit Radio, Inc., or Capital Transit Company? A. I do not.

Q. You mentioned that your company operated a broadcasting station and transit radio receivers. Where is that operation? A. That operation is in Cincinnati, Ohio.

201 Q. Mr. Taft, you mentioned that you are interested in the transit radio operation in Cincinnati. Do you have any knowledge as to any other cities that may have this type of operation? A. Yes, I do.

Q. Would you name them, please? A. Transit radio is now in operation in Cincinnati, Ohio; Houston, Texas; Baltimore, Maryland; St. Louis, Missouri; Wilkes-Barre, Pennsylvania; Evansville, Indiana; Topeka, Kansas; Des Moines, Iowa; Worcester, Massachusetts; Tacoma, Washington; Allentown, Pennsylvania; Huntington, West Virginia; Suburban Pittsburgh; and Washington.

Q. Do you have any information as to how long transit radio has been in operation in those cities and how

202 many sets may be in use at the present time? A. Yes, I can give you the complete information on that. Cincinnati was the first operation beginning July 10, 1948. There are now 475 vehicles equipped in Cincinnati.

Commissioner Lauderdale: Do you know the total number of vehicles in the cities?

The Witness: Yes.

Commissioner Lauderdale: Would you mind giving that?

The Witness: I can do that by cities and give you the total.

There are 2,945 vehicles equipped in these cities.

Mr. Dowd: I think what the Commissioner was interested in knowing, for instance, in Cincinnati you state you have 475 receivers. What is the total number of vehicles in Cincinnati?

The Witness: It is approximately 50 per cent of the total vehicles. It is about 80 per cent of the total available vehicles, by which I mean that in the old-fashioned street cars transit radios are not feasible because of the high noise level in those cars. We are installing them in about 80 per cent of the vehicles which we believe to be suitable for this purpose.

In Houston, Texas, there are 270 equipped vehicles; in St. Louis, approximately a thousand; in Wilkes-Barre, about a hundred; Evansville, 110; Washington, 220 suburban Washington, 30; Topeka, 50; Des Moines, 50; 203 Worcester, Massachusetts, 220—incidentally a complete installation; Tacoma, Washington, 135; Allentown, 75; Huntington, 55; suburban Pittsburgh, 75.

By Mr. Dowd:

Q. Did you mention Covington at any time? A. I include Covington in the Cincinnati figures.

Q. Is that a separate transit company? A. There are actually three companies: the Northern Kentucky, which operates into Cincinnati, is the Covington, Newport and Cincinnati Traction Company, the Green Lines—that is a complete installation, all of those except for 12 street cars.

Q. As the person in charge of the operation in Cincinnati, do you have any personal knowledge as to the acceptance by the public of transit radio in that city? A. Yes, of course. Four different surveys have been made in Cincinnati, including northern Kentucky. Before the Cincinnati Street Railway Company or the Green Lines en-



tered into a contract with us, they were very insistent that as complete a tabulation of rider opinion be obtained as possible. Obviously we were just as much concerned, we were perfectly aware that without a large measure of public support the whole project would fall to the ground. Therefore before a contract was drawn with either of these companies, more than 5,000 ballots were taken on a 204 random basis in the vehicles in those two cities and we obtained over 90 per cent favorable replies."

After three months of operation we made a recheck and took about 1,500 ballots and the result was very much the same. Only two or three months ago, after a complete year of operation, in order to determine what the continued thought of the public was, we took a third survey with almost an identical figure in favor.

Mind you, we are as aware of public acceptance as anybody else is. We can not possibly succeed unless we have a very considerable majority who favor it.

Q. Mr. Taft, have you received any information from any of the cities in which transit radio has been in operation which indicates that the installation may or may not have any effect on the safety of operations in those cities?

A. Yes. In Cincinnati, although no specific survey has been made, the safety director of the Cincinnati Street Railway Company has advised us that in no sense has radio in buses contributed to accidents in one year of experience. The figures in Cincinnati show that for the first eight months of 1949 as against the same period in 1948 there was a 13.3 per cent decrease in traffic accidents involving public vehicles.

Q. You are not maintaining, are you, Mr. Taft, that that 13.3 decrease is due solely to the installation of

205 radios? A. No, I am not maintaining that. I don't think sufficient information is available either in Cincinnati or in the other cities in which we are in operation to prove that definitely. I think the figures there and in other cities certainly do prove that there is no increase



in accidents because of radio and I think there is some indication that the accident rate tends to decline, although I certainly could not prove it, where radios are in the buses.

Q. Do you have any figures in reference to Covington where you say you have an almost complete installation?

A. Yes. I think it may be of some interest in Covington we have 112 out of 127 vehicles equipped. The only unequipped vehicles are old-fashioned street cars. They have been equipped since July 10, 1948. In other words, for considerably over a year almost a complete installation.

In the first six months of 1949 as against the same period in 1948 traffic accidents were down 31.7 per cent under the previous period, comparable period.

I think it is also interesting to note that Covington was one of the safety winners, was one of the three winners in its size class of the annual safety award.

Mr. Harrison: May I ask if that 31.7 per cent decline in Covington related to public transportation vehicles?

The Witness: Yes.

206 Mr. Pollak: Exclusively?

The Witness: Yes.

By Mr. Dowd:

Q. That related solely to the accident figures for the transit company in which these radios had been installed as against their previous period of operation? A. That is correct.

215 R. L. Willoughby was called as a witness and, having been previously duly sworn, was examined and testified as follows:

*Direct Examination*

By Mr. Awalt:

Q. Will you please give your name and address for the record? A. R. L. Willoughby, 4425 14th Street N. W. Washington, Apartment 32.

Q. Mr. Willoughby, are you employed by Capital Transit Company? A. Yes.

Q. How long have you been in the employment of Capital Transit Company? A. Twenty-four years.

Q. What is your present position with Capital Transit Company? A. Supervisor and instructor.

Q. How long have you been occupied in this position? A. Thirteen years.

Q. Will you please briefly explain your duties? A. I instruct new operators in the operation of both street cars and buses during their initial training and I instruct new operators during their 90-day probationary period. I also check and observe operators who have had complaints made against them or who have had an accident record. I also make recommendations as to the ability of operators.

Q. What proportion of your time is spent on instruction work and what proportion on checking and observing operators who have had accidents or complaints made against them? A. Approximately 10 per cent on initial instruction, 65 per cent on probationary work, and 25 per cent on complaints and accident work.

Q. When you say that you check and observe operators who have had complaints made against them or who have been in accidents, what exactly do you mean, Mr. Willoughby? A. The procedure would vary, depending on the particular case, but as the usual thing, I board a bus or street car which is being driven by the operator against whom complaints have been made or who has had an accident. I

observe the operator while he is operating the vehicle. I observe his reflexes, his general operation and technique. I point out to him any faults that I may see in his method of operation. I also discuss with him the complaint or complaints that have been made against him or the reasons that caused an accident. In general, I attempt to improve both his attitude and his operation.

Q. Were you at one time an operator yourself? A. Yes, I was and I now give demonstrations in operating street cars and buses.

Q. In checking an operator who has had an accident, do you go thoroughly into the stability of the operator? A. Yes. I check to see whether the operator is having domestic trouble, financial trouble, or if there is anything worrying him that would affect his general stability.

Q. Have any of the operators on whom you have checked as to complaints or accidents operated at any time radio-equipped buses or street cars? A. Yes.

Q. In the course of your checking, your official duties, have you ever had operators tell you that an accident or complaint made against them was caused by the reception over the radio sets in the street cars or buses which they operated? A. No.

Q. In your operation of street cars and buses for  
218 demonstration purposes have you operated buses or street cars equipped with radio receivers? A. Yes, I have operated both street cars and buses so equipped.

Q. Did you find that the reception from these radio-equipped buses or street cars in any way interfered with your operation or have you ever felt they affected the safety of our operation? A. I have never found that they interfered with the operation, nor do I believe that they have affected in any way the safety of such operation.

I might add that I am not conscious of the program which is being received.

Mr. Awalt: You may cross-examine.

### *Cross-Examination*

By Mr. Harrison:

Q. Mr. Willoughby, are you able to hear ordinary traffic signals when you are operating a street car or bus equipped with a radio receiver? A. I certainly can.

Q. Are you able to hear the signal bells on the vehicle, the call bells to stop? A. I certainly can.

Q. Is there a receiver near the driver of the vehicle?

219 A. I am not too familiar with the location of the receivers but I think there is one a few feet in back of him.

Q. Has the reception in any way interfered with your operation of a street car or bus? A. It certainly has not.

Q. What is there about it that might interfere, if it did interfere? A. I don't know of anything. I don't give it any attention.

Q. Have you found that the volume is too great? A. No, I haven't.

\* \* \* \* \*

*Cross-Examination*

A By Mr. Pollak:

Q. How much time have you spent yourself driving vehicles which have radios installed in them? A. I  
220 have no record of that but I would say I have driven about 20 a month, 20 buses or cars so equipped.

Q. Each month? A. Each month.

Q. How much time do you spend in those on the average roughly on such occasions? Is it an hour or a day? A. two or three hours roughly.

Q. Did you ever ask drivers of street cars whether they liked these radio installations? A. I have, especially so since this investigation started.

Q. What have they answered? A. Most of them said that they liked it and some of them said it didn't affect them one way or the other.

Q. Did some of them say they did not like it? A. No, I haven't had a single one who said he didn't like it?

Q. When you drive these buses yourself, or trolley cars, with the radio installations, do you call out the streets which you are coming to? A. I do.

Q. Do you find that extra effort is required to call them out when the radio is playing and the buses are stopped for traffic, for example? A. No, just the usual tone.

Q. Are the radios installed in training vehicles?  
 221 A. Yes, we use them if there are any available at the time.

222 E. L. Keller was called as a witness and, having been duly sworn, was examined and testified as follows:

*Direct Examination*

By Mr. Awalt:

Q. Will you please give your name and address: A.  
 E. L. Keller, 4423 Chesapeake Street, N. W.

Q. Are you employed by Capital Transit Company? A.  
 Yes.

Q. What is your present position? A. I am instructor in the operation of buses and street cars.

Q. Will you please explain your duties in more detail?  
 A. After operators have finished their initial training, they enter a probationary period of 90 days during which time it is my duty to follow up with instructions to those operators assigned to me during that 90-day period. I also make recommendations on the operator's ability to perform his duties.

During this work I of course ride transit vehicles most of the time. I also have occasion, since I use transit vehicles getting to and from the various assignments, to observe other operators in the operation of their vehicles.

Q. How long have you been employed by Capital  
 224 Transit Company? A. Nine and one-half years.

A. How long have you been in your present position? A. Four years.

Q. Before taking your position, were you an operator of vehicles on the Capital Transit System? A. Yes.

Q. In the course of your duties do you now operate Capital Transit vehicles? A. Yes, I do. It is part of my instruction work.



Q. In the course of your duties do the operators you instruct and those you observe in riding the street cars and buses operate radio-equipped vehicles? A. Yes.

Q. From your observations of the operators on these vehicles equipped with radio receivers do you find that the operation is in any way interfered with by the reception over the radio speakers? A. No.

Q. From your observation do you or do you not believe that the safety of the operation of the vehicle equipped with radio receiver is in any way impaired by the reception received from such receiver? A. From my observation I believe that the safety factor is not in any way interfered with by the reception received over the radio receivers.

Q. Have you in the course of your duties talked to any of the operators as to whether or not they like or dislike to operate vehicles equipped with radio receivers? A. Yes, I have talked to about 100 operators who have operated vehicles equipped with radio receivers and almost without exception they like to drive the vehicle so equipped.

Q. You stated that as part of your duties in connection with instructions that you actually operated vehicles. Were any of these vehicles equipped with radio receivers? A. Yes.

Q. During your operations were programs being received over the radio receivers? A. Yes, in a great many cases.

Q. Did you find that such programs in any way interfered with your efficient operation of the vehicle? A. No.

Q. Would you prefer to operate a vehicle equipped with a radio receiver rather than one not so equipped? A. I would prefer the one equipped with the radio receiver.

Q. Why? A. I find that the public in general is in a better mood.

Mr. Awalt: You may cross-examine.

By Mr. Harrison:

Q. In the operation of radio-equipped buses or street cars are you able to hear the traffic signals such as given by police officers or automobiles blowing their horns? A. Yes, sir.

Q. Does the sound interfere in any respect with the hearing of such signals? A. No, sir.

Q. Are you able to hear the stop bell on the vehicle? A. Yes.

Q. Have you ever observed whether or not a person who asked for street directions or where to get off a vehicle has been unable to be heard either by the driver or the driver has been unable to hear the question? A. No sir, I have not.

Q. Has that matter ever come to your attention at all? A. Not where the operator could not hear the passenger, no sir.

Q. In riding on one of the vehicles as an instructor what is your position in relation to the driver, near or far away?

A. Near.

Q. Is it on the seat immediately behind him? A. On either side of the car.

227 Q. Have you ever driven a vehicle occupied by school children? A. Yes, sir.

Q. Which is more distracting to the driver, the sound of school children or the sound of the radio reception? A. School children.

Q. Have you observed the normal tone of voice between passengers talking amongst themselves and the radio reception to see which may be louder, to see if one interfered with the other? A. I notice the tone of the people's voice much more than the radio because I do not pay any attention to that.

Q. You mean it is louder than the radio? A. I think you could distinguish the voice more clearly.

Q. Did the radio sounds interfere with your discussion with the driver when you were instructing him in any way?

A. No, sir.

Q. Do you have to speak in a louder tone of voice than you do on a vehicle not so equipped? A. No, sir.

229 I. S. Nichols was called as a witness and, having been first duly sworn, was examined and testified as follows:

*Direct Examination*

By Mr. Awalt:

Q. Will you please state your full name and address?

A. I. S. Nichols, 6007 Ryland Drive, Bethesda, Maryland.

Q. Are you employed by Capital Transit Company? A. Yes, sir.

Q. What is your present position? A. I am supervisor-instructor on car operation.

Q. When you say car, you mean street cars? A. Street cars, yes sir.

Q. Will you please explain your duties in more detail?

A. After operators have finished their initial training, they enter a probationary period of 90 days during which time it is my duty to follow up with instructions to those operators during that 90-day period. I also make recommendations on operator's ability to perform his duties. During this work I ride street cars most of the time. I also have occasion, since I use transit vehicles getting to and from various assignments, of observing other operators in their operation of their vehicles.

230 Q. How long have you been employed by Capital Transit Company? A. Twenty-six years.

Q. How long have you occupied your present position? A. Eleven years.

Q. Before taking your present position, were you an operator of vehicles on the Capital Transit System? A. Yes, sir.

Q. In the course of your duties do you now operate Capital Transit vehicles? A. Yes, sir.

Q. In the course of your duties do the operators you instruct and others you observe in riding street cars and buses operate radio-equipped vehicles? A. Yes, sir.

Q. From your observations of the operations on those vehicles equipped with the radio receivers do you find that the operation is in any way interfered with by the reception over the radio speakers? A. No, sir.

Q. From your observation do you or do you not believe that the safety of the operation of vehicles equipped with radio receivers is in any way impaired by the reception received from such receivers? A. From my obser-

231 vation I believe that the safety factor is not in any way interfered with by the reception received over the radio receivers.

Q. Have you in the course of your duty talked to any of the operators as to whether or not they liked or disliked to operate vehicles equipped with radio receivers? A. Yes. I have talked to at least 200 operators who have operated vehicles equipped with radio receivers and almost without exception they like to drive cars and buses so equipped. I might say that in the early days there were some few complaints by operators with respect to loudness but in the last month or so I have not had these complaints.

Q. Mr. Nichols, you stated that as part of your duties in connection with instructions you actually operated vehicles. Were any of these vehicles equipped with radio receivers? A. Yes.

Q. During your operation of these vehicles were programs being received over radio receivers? A. Yes, in many cases.

Q. Did you find that such programs in any way interfered with your efficient operation of a vehicle? A. No.

Q. Would you prefer to operate a vehicle equipped with radio receivers rather than one not so equipped?

A. I would prefer to operate one with the radio  
232 receivers.

Q. Why? A. Because it has a tendency to keep the passengers in a better mood and they are easily handled that way. It also makes it easier on the operator himself.

Mr. Awalt: You may cross-examine.

*Cross-Examination*

By Mr. Harrison:

Q. Did you find in your own operation of radio-equipped vehicles, Mr. Nichols, that the sound from the receivers distracted your attention to your driving? A. No, sir.

Q. Does it tend to fatigue you, listening to the constant drumming out of music, news announcements, weather reports? A. No, sir, it did not because I don't allow it to interfere with my work. When you are driving a street car your duties require your full attention and as far as the radio is concerned you don't even know it is there.

Q. In operating such vehicles could you hear the street signals such as a policeman's whistle or horns on an approaching vehicle? A. Yes, sir.

Q. Have you operated street cars with school children on them? A. I have sir.

Q. Have you operated such a vehicle equipped with radio? A. Yes, sir.

Q. Which is louder, the school children or the radio? A. Naturally the school children are.

Q. Have you ever observed whether or not the radio reception interfered with conversation of passengers? A. No, sir.

Q. Have you observed whether or not the tone of the passenger is below or higher than that of the radio? A. No, sir, I have not.

Q. Have you ever had complaints from passengers on your street car of the noise from the radio? A. Not that I can recall. I don't remember of any one instance.

Mr. Harrison: Thank you, Mr. Nichols.



*Cross-Examination*

By Mr. O'Dea:

Q. You say the radio makes it easier on the bus operator or street car operator? A. Not exactly the radio makes it easier. When you have a bunch of passengers who are congenial, friendly, that has a tendency to make your work easier as an operator.

Q. And the radio makes the passengers congenial?  
234 A. That is my idea.

\* \* \* \* \*

K. C. McCloskey was called as a witness and, having been first duly sworn, was examined and testified as follows:

*Direct Examination*

By Mr. Awalt:

Q. Will you please give your name and address? A. K. C. McCloskey, 2821 63rd Place, Cheverly, Maryland.

Q. Are you employed by Capital Transit Company? A. Yes, sir.

Q. How long have you been in the employment of the company? A. Seven years.

Q. What is your present position with the company?  
235 A. Safety supervisor.

Q. How long have you occupied that position? A. Five years.

Q. Will you please explain your duties? A. As my title indicates, I am principally charged with the question of safety with respect to the operation of street cars and buses. I am interested in preventing accidents of any kind or nature connected with buses or street cars and for this reason, among other things, I visit any place where an accident has occurred. I go into the reasons for such accidents, whether such accidents could have been prevented. I talk with operators as to the prevention of accidents, whether there are any hazardous points on their routes and whether anything can be done to protect these hazardous points.

I have a general knowledge as to the cause of accidents. I also give short talks on safety to public bodies such as citizens' associations, luncheon clubs, schools, parent-teacher associations and so forth with illustrating motion pictures.

Q. Mr. McCloskey, have you ever been an operator of a street car or bus? A. Yes, sir.

236 Q. In the course of your duties do you ever now operate a street car or bus? A. Yes, I do in order to check the safety factors.

Q. What was your reaction when you first learned that radio receivers were to be installed on street cars and buses of the Capital Transit Company? A. I was opposed to such installation. I felt that radio reception would interfere with the efficient operation by operators of street cars and buses and would decrease the safety factor.

Q. Do you still feel the same way? A. No sir, I do not. I have found in my study of accidents or safety factors that the radio does not in any way interfere with the efficient operation and I have found that it has not been the cause of any accidents.

Q. Have you talked to any of the operators with respect to the operation of radio-equipped vehicles? A. Yes, I have talked to approximately 500 operators and I have found only one who was opposed to the radio.

Mr. Harrison: You said only one?

Mr. Awalt: Yes.

By Mr. Awalt:

Q. Have you found in your own operation of radio-equipped vehicles that the program received distracted your attention in any way from the operation of the vehicle? A. No, I have not.

237 Q. Mr. McCloskey, where in your opinion do the greatest number of traffic accidents occur in the District of Columbia? A. In what is known as the congested business section. By congested business section

I mean the area of about eight blocks long and six wide, bounded on the east by 7th Street, Northwest; on the west by 15th Street, Northwest; on the south by Pennsylvania, Northwest; and on the north by New York Avenue, Northwest. The area is approximately one square mile.

Q. When you say the greatest number, what exactly do you mean? A. I mean the area I just described as compared with any area of similar size in the District.

Q. What is the approximate area of the District of Columbia? A. Approximately 68.9 square miles.

Q. What percentage of Capital Transit traffic accidents occur in this one-square-mile area as compared with the 68.9 square miles area of the entire District of Columbia?

A. Approximately 11 per cent.

Q. Do you know the number of lines on which radio-equipped vehicles are used that travel into or through this congested business section? A. Yes sir, 32 enter or travel through such area out of the 43 lines on which radio-equipped vehicles run, or about 76 per cent. Eleven do not travel in the congested business section as defined by me.

Q. Of all the lines running into this congested section, how many lines do not have radio equipment? A. Of the 39 lines entering such area, seven lines do not have any radio equipment.

Q. Then, as I understand your testimony, the 39 lines, of which 32 have radio equipment on them, are subject to a greater traffic hazard than those not entering the congested business section? A. Yes, sir.

Q. In your opinion in any comparison of traffic accidents, should weight be given to the fact that about 76 per cent of the lines which have radio-equipped vehicles on them enter the congested business area? A. Yes, sir.

Q. How many lines are there in the Capital Transit System? A. Approximately 121.

Q. Am I correct then in understanding your testimony to be that Capital Transit lines total 121, of which 43, or 35

per cent, have radio equipment; that of the 43, approximately 76 per cent enter or travel through the congested business area as defined by you; and of the 78 lines on which there are no radio equipment, seven lines, or less than 10 per cent of the non-radio-equipped lines,

239 enter or pass through the area defined by you? A.

Your understanding of my testimony is correct, which also means that 76 per cent of the radio-equipped lines are exposed to a greater accident hazard than those not so equipped, the latter exposure being about 10 per cent.

Q. Have you made available to you information maintained by the Office of Director of Traffic as to the increase of traffic congestion in the District of Columbia? A. Yes, sir.

Q. Did you acquire this information as part of your official duties? A. Yes, I do as a regular part of my duty in order to keep abreast of any condition which affects the safe operation of the company's vehicles.

Q. What does that information show as to increase in vehicle traffic entering the District in recent periods? A. It shows an increase of about 10 per cent for 1949 over 1948, and an increase in the number of registrations of motor vehicles within the District for 1949 of 13,789 over 1948 up to September 30, or approximately a 9 per cent increase.

Q. What conclusion do you draw as to these figures? A. This creates a greater traffic hazard and greater exposure to accidents.

Mr. Awalt: You may cross-examine.

240 *Cross-Examination*

By Mr. Harrison:

Q. Mr. McCloskey, did you hear Capt. Johnson of the Inspector's Office and Police Department testify yesterday?

A. Yes, I did.

Q. Do you remember his stating that since July there had been 180 accidents involving street cars? A. Yes, sir.

Q. And 26 of them were equipped with radios? A. Yes, sir.



Q. Did you investigate those accidents? A. I wouldn't say I investigated the particular accidents, no.

Q. Did you investigate the cause of those accidents in those cases? A. I couldn't say as to any individual accident. My job is to talk to every operator I possibly can regarding accidents and I don't pay any attention, you might say, to an individual accident unless it is serious.

Q. Did anybody from your Safety Department make an investigation to see whether or not the use of radios on the street cars or buses involved in accidents, about which Capt. Johnson testified, caused the accidents? A. I am the only one in my department and my job is to try to find  
241 the causes of accidents and then offer recommendations to the company for the elimination of such hazards.

Q. So, your information is first-hand, is it? A. That is right. And in the course of talking to operators where there was a radio-equipped vehicle involved in an accident I have asked them, did the radio cause that accident, and they have all thus far answered No.

Q. Have you yourself operated radio-equipped vehicles? A. Yes, sir, I have.

Q. Have you been able to hear the traffic signals over the radio sounds? A. Very plainly.

Q. Did you observe whether or not passengers could be heard making inquiries as to the location of streets? A. In my opinion they can.

Q. I think you testified in your original testimony that you had not found that the radio had caused a single accident. Was my understanding of your testimony correct? A. That is correct, yes sir.

242 **Max F. Ryan** was called as a witness and, having been first duly sworn, was examined and testified as follows:



*Direct Examination*

By Mr. Awalt:

Q. Will you please state your name and address for the record, Mr. Ryan? A. Max F. Ryan, 8209 Queen Anne Drive, Silver Spring, Maryland.

Q. Are you employed by the Capital Transit Company? A. Yes, sir.

Q. What is your position with the Capital Transit Company? A. I am chief clerk in the Claims Department.

Q. As chief clerk in the Claims Department, do you have access to the records of traffic accidents occurring on Capital Transit buses and street cars? A. Yes, sir.

Q. Have you had prepared under your direction and supervision, based on Capital Transit records, a study of the ratio of traffic accidents operated by Capital Transit on the rate of accidents per 100,000 miles? A. Yes, sir.

Mr. Awalt: Mr. Chairman, may I ask that this document be marked for identification as Company's Exhibit No. 2? Chairman Flanagan: It may be so marked.

(The document above referred to was marked Company Exhibit No. 2 for identification.)

By Mr. Awalt:

Q. I hand you a document headed "Rate of Traffic Accidents per 100,000 miles Transit Vehicles, First Nine Months 1949 and 1948," Company Exhibit No. 2 for identification, and ask you whether this is the document prepared for which you have responsibility. A. Yes.

244 Q. Will you please explain this exhibit? A. This exhibit shows the number of traffic accidents that occurred on all vehicles from January 1 through September 30, 1949, the rate being 9.99 accidents per 100,000 miles. It shows the rate of traffic accidents for the same period in 1948 to be 9.54 accidents per 100,000 miles of operation, which is an increase in 1949 over 1948 of .45 or 45/100ths of one percent per 100,000 miles.

Q. Do I understand this exhibit covers the traffic accidents over the entire system of Capital Transit Company?

A. Yes, sir.

Q. Have you had prepared under your direct supervision a study showing the traffic accidents occurring on radio-equipped vehicles from February 10, 1949 to September 30, 1949, compared with the same vehicles not equipped with radios for the same period in 1948? A. Yes sir, I have.

Q. I hand you a document headed "Rate of Traffic Accidents Per 100,000 Miles on Radio Operated Vehicles From 2/10/49 to 9/30/49, Compared With Same Vehicles For Same Period 1948." Was this document I have just described prepared under your direction? A. Yes, sir.

Mr. Awalt: Mr. Chairman, may I ask that this document be marked as Company's Exhibit No. 3 for identification?

Chairman Flanagan: It may be so marked.

245

(The document above referred to was marked Company Exhibit No. 3 for identification.)

Mr. Harrison: Mr. Awalt, I did not hear the exact description, but does that mean that Exhibit No. 2 relates to accidents on vehicles not equipped with radios?

Mr. Awalt: Company's Exhibit No. 2 represents the accidents on all vehicles of the Capital Transit Company, including those equipped and not equipped, for the comparative period of nine months of 1948 and 1949.

Mr. Harrison: Thank you.

By Mr. Awalt:

Q. Mr. Ryan, will you please explain the exhibit and the procedure that was used in making this exhibit? A. In making this study we listed by number all the vehicles which were equipped with radio receiving sets from February 10, 1949 to September 30, 1949. From our records we then determined the number of traffic accidents which this group of vehicles had up to and including September 30 of this year. We then calculated the number of miles operated by these vehicles from the date of installation of the radio

receiving sets to September 30, 1949. So we arrived at a rate of traffic accidents per 100,000 miles. We also calculated in the same manner the number of accidents on the same vehicles as a group for a like period for the year 1948 when not radio equipped.

The over-all figure for 1949 is 8.81 accidents per 100,000 miles of operation of radio-equipped vehicles and for 1948 the over-all figure is 8.96 accidents per 100,000 miles of operation of the same vehicles not radio equipped. This is a decrease of .15 or 15/100ths of an accident per 100,000 miles.

Q. Then do I understand from these two exhibits that the over-all traffic accident rate for the entire system increased in 1949 45/100ths of an accident per 100,000 miles and that on the radio-equipped vehicles compared with the same operation for the same vehicles not radio equipped in 1948, there was a decrease of 15/100ths of an accident per 100,000 miles? A. That is right.

Q. Do I also understand from these exhibits that the over-all traffic accident rate for the entire system for 1949 is 9.99 accidents per 100,000 miles and on the radio-equipped vehicles for 1949 the over-all traffic accident rate is 8.81 per 100,000 miles? A. That is correct.

Q. Then do I understand that the traffic accident rate per 100,000 miles on the radio-equipped vehicles is less than the traffic accident rate per 100,000 miles on all the vehicles operated by Capital Transit for 1949? A. That is correct, it is 1.18 less accidents per 100,000 miles.

Q. During what hours do the programs on the radio-equipped vehicles operate? A. They only operate between 7 a. m. in the morning and 7 p. m. in the evening and they do not operate on Sunday.

Q. In giving the figures on Exhibit 3 as to traffic accidents on the radio-equipped vehicles, they include traffic accidents when the radio was not in operation? A. That is right. Twenty-seven per cent occurred after 7 p. m. and before 7 a. m. when the radios were not operated.

Q. Or on Sundays? A. Or on Sundays.

Q. In other words, as I understand it, the 27 per cent includes on weekdays the time that the radio was not operating between 7 p. m. and before 7 a. m. and also includes accidents that happened on Sunday when the radio was not operated? A. That is right.

Q. Were you present yesterday when Capt. Johnson of the Police Department testified? A. Yes sir, I was.

Q. I find that he stated, and I refer to page 6 of the transcript of yesterday's hearing:

"Since the 1st of January there have been 57 248 traffic fatalities, 10 of which have been caused or involved street cars and seven of which involved buses. Only one of those 17 was radio equipped at that time."

Did you hear that? A. Yes sir, I did.

Q. Have you examined the records of Capital Transit Company to ascertain at what time this accident occurred? A. Yes, sir.

Q. I am speaking of the one fatality on radio-equipped vehicle. A. That is right.

Q. What time did it occur? A. It occurred at 12:25 a.m.

Mr. Harrison: That is when the program was not on?

The Witness: That is right, it was not operated.

Mr. Awalt: You may cross-examine.

Mr. Harrison: I have no questions.

### *Cross-Examination*

By Mr. O'Dea:

Q. Mr. Ryan, I am curious as to the figures on July, August and September, why they are so much larger than the other months. Do you have any explanation for that? A. Yes, sir. We had more vehicles equipped in those months.

You see, we have been equipping them periodically. 249 We installed in February. You notice as we equip the vehicles the accidents rise and when you get up to July we had—I don't know how many but we had quite a few more than we had in February, so that the accident

rate went up. In September that is also true because we then had 212 vehicles equipped, the accidents rose with the increase in the number of radio-equipped vehicles.

Mr. O'Dea: Thank you, sir.

*Redirect Examination*

By Mr. Awalt:

Q. I understood you to say the accidents increased but the rate did not increase, did it? A. I did not compute the rate by months.

Q. But the over-all rate did not? A. I just said the number of accidents increased naturally because the number of vehicles increased.

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250 . **Andrew Sarkady** was called as a witness and having been first duly sworn was examined and testified as follows:

*Direct Examination*

By Mr. Awalt:

Q. Will you please give your full name and affiliation?  
A. Andrew Sarkady. I am Director of Research for Edward Doody and Company, 911 Locust Street, St. Louis, Missouri.

I am also Assistant Professor of Market Research at Washington University at St. Louis, Missouri.

Q. What is your educational background? A. I am a graduate of Princeton University and did postgraduate work at Rutgers University.

Q. What do you teach at the Washington University of St. Louis? A. Market Research which is the study of personal opinion surveys and market surveys.

Q. How long have you been employed by the Doody Company? A. Three years.

251 Q. Where were you employed previously? A. Crossley, Incorporated, a New York City Research Company, and prior to that I was Regional Supervisor of



U. S. Bureau of the Census, Middle Atlantic and New England States for four and one-half years.

Q. What were some of your responsibilities at the Census Bureau? A. Administration and direction of field office, training and supervising personnel, adapting and applying the principles of random-sampling throughout the Middle Atlantic and New England States as well as Washington, D. C.

Mr. Pollak: What samples?

The Witness: Applying the principles of random sampling throughout the Region.

By Mr. Awalt:

Q. Does this mean you planned the sample and supervise surveys made here in Washington, D. C.? A. Yes, it does.

Q. What kind of surveys were they? A. They varied, they were Labor Force studies, housing studies and railroad passenger traffic surveys as well as consumer requirement studies for the War Production Board.

Q. Were these studies made for private industry or were they made for government agencies? A. Those were all for the government.

252 Q. Did you plan the sample on both the April and October studies that the Doody Company made on "Attitude of Capital Transit Company Customers toward transit radio"? A. Yes, sir; I did.

Q. Will you please state how you did so? A. The objective in planning the sample was to adhere as closely as possible to the rules of random selection. By random selection is meant that each person or item in a survey has an equal opportunity to fall into the sample. It has been proven by quality control, market and opinion surveys, and other probability studies that by random selections, from any group of items or people a representative sample of the subject matter would be obtained.

When this random process of selection is followed, the degree of accuracy of the sample can be measured.

Based on this mathematical fact, and in the absence of known data about the characteristics of the transit public at any given time, random sampling was decided upon as the most accurate and scientific method of evolving a cross-section and reflection of passenger attitude.

The lines on which the surveys were made were those where radio-equipped vehicles were operating since it was the logical place to find people exposed to the medium.

The division between total bus and streetcar interviews is an immaterial factor really under the rules of 253 random selection. However, a division was made on the basis of the ratio of equipped busses to equipped streetcars for several reasons: One, to provide some guide for the field work; two, to establish a sufficient sample for comparing April and October bus results specifically, and three, continue our study of the many influences on the reaction to transit radio, in this case streetcar riders versus bus riders. This latter point had not appeared as a possibility thus far.

Random selection on the vehicles was planned and executed to the best of our ability. Every fourth person was interviewed on a vehicle. It was not always possible to interview every fourth person because crowded conditions sometimes made aisle interviewing necessary and passengers sometimes left the vehicle just prior to the instance of being interviewed, or passengers boarded and had not ridden four or five blocks to qualify for interview.

But this systematic random selection of every fourth or fifth rider was maintained and the homogeneity of the sample is reflected in the result found from study to study.

Q. Does your testimony mean that the sample you used in making the survey by the Doody Company was representative of the attitude of the public riding radio-equipped vehicles in Washington? A. Yes, sir.

254 Q. In our opinion, if a survey were made of all the transit riders on radio-equipped vehicles, would the results be the same as those obtained in your survey?

A. It definitely would.

Q. In your opinion, can this Commission rely on this survey as an accurate representation of transit rider opinion? A. Yes, sir.

268 **Edward G. Doody** was called as a witness and having been first duly sworn was examined and testified as follows:

*Direct Examination*

By Mr. Awalt:

Q. Will you please give your full name and address for the record? A. Edward G. Doody, 911 Locust Street, St. Louis, Missouri.

Q. What is your business? A. I am the owner of Edward G. Doody & Company, a research company, marketing research company, specializing particularly in opinion research studies.

Q. How long have you been engaged in such business? A. Since 1941.

Q. Will you please tell us generally some of the research studies that your organization has conducted? A. Yes. We do continuous research for the Pepsodent Division of Lever Brothers Company. We have continuous panels throughout the country where we are doing product testing on their new products. We serve the St. Louis Post-Dispatch in connection with advertising and readership surveys and have even made some circulation checks for them.

Speaking of St. Louis, we also work for the St. Louis Star-Times and the St. Louis Globe-Democrat. In fact, we do work for all three of the newspapers there.

In the transportation field we have made a number of studies for companies throughout the country, including the St. Louis public service company, Indianapolis Railways, Kansas City Public Service Company, and Detroit Street Railways, among others. Brown-Forman, a  
270 Louisville distiller, has used our services in finding

out better markets for their products and also doing some product testing.

In the department store field our clients include such firms as the May Company in Cleveland and St. Louis, J. L. Hudson in Detroit, L. S. Ayres in Indianapolis and the Kaufman Company in Pittsburgh.

We also work in the food field with such super markets as Weingarten's in Houston and Betindorf's in St. Louis. The Grapette Company in the Beverage field located in Camden, Arkansas is another of our clients and we are currently doing a study for them.

I guess I might wind up by saying that we work for maybe 50 or 60 advertising agencies including such firms as Young and Rubicam and Henri, Ruthrauff and Ryan, Foote Cone and Belding, McCann-Erickson, Hurst and McDonald, Inc., and others.

Q. Have you made any studies in the radio field? A. Yes, we do studies for radio stations, certainly from the eastcoast through to the Rockies, of a coincidental nature like the Hooper Studies where we call people and say, "This is a radio survey. Is your radio on now?" We have also done in this connection a diary study, such as the Columbia Broadcasting Company, as a matter of fact, they are our clients. In other words, a diary study is where a diary is left in a home by a radio and they keep track of what they listen to for a week.

Q. Did you conduct a public opinion study or survey in Washington, D. C. with respect to radio reception in busses and streetcars in April 1949? A. Yes.

Q. Will you please explain the procedure you used in making the April 1949 survey? A. Well, the purpose of this study was to determine the reaction of Capital Transit customers to continuing radio programs while riding in radio equipped vehicles. Answers to the problems were approached in two separate directions. First of all, on the bus interviews to study passenger reactions within the medium itself and then interviews at bus stops to determine

rider knowledge and attitudes outside the influence of the medium.

I would like to point out here that these bus stop interviews were made before they boarded the vehicles, not after they alighted the vehicles.

The on-the-bus interviews, persons there had an opportunity to listen to the music as you ride and can judge the immediate impact of it at that time most perfectly and give it to us. This is distinct from possible attitudes outside of the medium. Each approach can apply a different question, such as, "would you like such programs to become a part of regular service?" Opportunities for public expression on the busses had to be offered because one, consumer acceptance is of primary importance and, two, listening reaction to broadcasts themselves will determine the financial success of a medium.

Interviewing of passengers was conducted on four lines on which five radio-equipped busses each were assigned. The vehicles had been in operation for a sufficient period of time to permit considerable familiarity of the riders with FM radio.

Of course it was anticipated that there would be a number of riders who would be taking their first rides on the radio-equipped bus at the time of the interview. Nevertheless, the primary objective to study the reaction within the medium was accomplished.

Trained investigators boarded busses during the hours of 7 a. m. to 7 p. m., daily, Monday through Friday and from 7 a. m. to 3 p. m. Saturday during the week of April 1 to 7, 1949.

Interviews were made according to peak and low passenger loads during the broadcast day. Persons interviewed were selected at complete random after they had ridden at least four or five blocks.

The four lines selected for the bus operations and the survey were the A Lines, Congress Heights; D-2, 4, Glover Park-Trinidad line; the L-4, Connecticut Avenue



273 line; and S Lines, 16th Street. It was believed that they would cover about every economic strata and represent a cross-section of the riders at least as best under the present system of routes.

Based on Capital Transit passenger figures, Lines A, D and S are about the same in respect to daily loads. However, Line L is about 127 per cent of any of the three lines. Thus, Line L was allocated 29.7 per cent of the planned 2,500 quota of interviews, the others being 23.4 per cent of each.

Q. When you speak of 23.4 that is a percentage figure?

A. Yes, and that is 29.7.

Q. 29.7. A. Yes, those are percentage figures. So that we would apportion our figures according to the peak loads. As for the bus stop interviews, again the purpose was to obtain the attitudes and reactions of the riding public to transit radio outside the medium, the best expedient under the existing time table of events, and which was utilized, was the interviewing of persons at bus stops along the bus routes where the radio busses were in operation. In this manner, customers who had experienced music as you ride, as well as those who had not could be interrogated.

The bus stops offered the best source of potential transit riders.

274 How people react within a particular atmosphere might be different outside the same environment. So, assuming this possibility, the decision to interview Transit Company customers away from the radio-equipped busses was a step in that direction.

Personal contacts again were made at complete random as persons waited for transit connections. Field operations were conducted during the same week that on-the-bus interviews were made. The L Line, again received the largest quota as opposed to the other three. A total of 2,320 contacts were made; that is, total interviews.

Mr. Harrison: That is on the L Line?

The Witness: No, sir; that is all together. That line L, it would be 29.7.

There were 29 bus stops covered on the four routes during the broadcast day. In other words, those were our interviewing points, the 29 various stops. These stops were selected by the Capital Transit Company's traffic Department because they are centrally located and were representative and about a good a place as any on the respective lines to get a broad cross-section of riders.

By Mr. Awalt:

Q. What was the result shown by this survey? A. The results shown in this survey were that 94.1 per cent were not opposed. We asked the specific question of 275 them, "would you like such programs to become a part of regular service?" Of this percentage 79.6 were definitely in favor, 14.5 were either indifferent or did not know, and 5.9 were not in favor.

The Witness: This 5.9 that were not in favor we asked them specifically after we had their reasons why not, "Well, even though you don't care for such programs personally, would you object if the majority of passengers wanted busses and streetcars equipped with radio receivers?" When asked that question 4.7 said that they would not object or, in other words, would not oppose the majority will. This leaves a balance of 1.2 firmly opposed.

In answer to the specific question, "Would you say that these programs make your ride seem more enjoyable, less enjoyable, or neither?" I would like to say that our investigators were instructed and it says so right on the questionnaire to rotate the "more" and "less" enjoyable. 79.9 answered yes, that it made their ride seem more enjoyable, 5.4 that was less enjoyable and 14.7 said neither.

276 By Mr. Awalt:

Q. Were you requested to make a supplemental survey and study of public reaction to the music as you ride pro-

grams on Capital Transit busses and streetcars? A. Yes.

Q. Did you make that survey? A. Yes.

Q. When did it start? A. You are referring to attitudes of Capital Transit customers, study No. 2?

Q. Yes. A. That survey was made between October 11 to October 17.

277 Q. Will you please explain the procedure used and results shown by this survey as set forth in the report? A. In order that the results of both the April and October studies would be comparable, the same sampling procedure was followed for bus interviews.

The sample distribution in Study No. 2 was broadened to include interviews on streetcars which were equipped with radio receivers since our first survey in April. You see, when we made the study back in April there weren't any radio receivers on streetcars.

The same questions relating to rider reaction were asked in both surveys. Study No. 1 included interviews with passengers at bus stops, however, in view of the results found in our previous studies of rider reaction toward transit radio, not only in Washington, but in St. Louis, we concluded that Study No. 2 could be confined to interviews aboard radio-equipped vehicles.

By Mr. Awalt:

Q. Mr. Doody, what was the result shown by the survey, by Study No. 2? A. Again quoting that same question.

Q. What same question? A. "Would you like such programs to become a part of regular service?" 93.4  
278 per cent were not opposed; that is, 76.3 were in favor, 13.9 said they didn't care and 9.2 said they didn't know.

I would like to explain here that the figure in the April survey is a combination of "don't care" and "don't know." In this particular survey we were able to break down "don't knows" and "don't cares" as I have given them here.

Mr. Pollak: Which figure in the April survey is that combination?

The Witness: 14.5.

Mr. Pollak: What?

The Witness: Said either they didn't know or didn't care. Here we were able to separate them, "don't care," 13.9; "don't know," 3.2.

6.6 were not in favor but when asked the question, "Well, even though you don't care for such programs personally, would you object if the majority of passengers wanted busses and streetcars equipped with radio receivers?" 3.6 said they would not object or oppose the majority will. This leaves a balance of 2 per cent firmly opposed.

\* \* \* \* \*

282 Q. Now Mr. Doody, before you made the survey which you commenced in October 11, did you attend a conference with Commissioner Lauderdale and members of the staff of the Commission? A. Yes.

Q. What was the purpose of this conference? A. I have been informed that the Commission was desirous of knowing how the survey was to be conducted; that they wanted to be sure it was an impartial survey and that they might want to have us cover specific information.

Therefore, the purpose of this conference was to acquaint the Commissioners and the staff of the Commission with the survey which we intended to make and to find out from them if there was any particular phase of the general question that they wanted covered for the Commission's information.

Q. As a result of this conference, did you alter your plans in any way with respect to making a survey? A. Yes. The Commissioner and the staff emphasized that they were particularly interested in the effect of music as you ride on the operators driving such equipped vehicles with particular emphasis on the safety factor. As a result of this conference I added to the survey a check of operators of four divisions of the company having the greatest number

283 of vehicles equipped with radio receiving sets. These divisions are known as the Northern, Southern, Brightwood, and Western.

Q. What procedure was used in making the survey? A. We prepared a set of nine questions to be asked of the operators at each of the four divisions I mentioned.

Q. What did you do next? A. I arranged for either myself or the staff to meet at the Superintendent's office at each division and interview the operators as they came off their various runs. The first interviews were made at the Western Division on October 12th, and these interviews were conducted by me personally. Like interviews were conducted at the other divisions, for instance, the 284 Northern Division was covered on October 13, and 14, and the Southern and Brightwood Divisions were covered and the operators interviewed on October 13.

Q. In conducting these interviews did you or your staff make any effort to pick out particular men for such interviews? A. Not at all. Operators were selected at complete random as they entered the Division office to turn in. Any operator who had operated a vehicle equipped with radio receivers was considered eligible; that was the only requirement.

Q. Did you ask the name or number of any operator? A. We did not.

Q. Why did you not? A. We wanted the men to feel, to have every assurance, that these interviews would not be turned in or in otherwise be a subtle attempt to get data which might later be used against them.

Mr. Harrison: May I ask there, you mentioned the superintendent's office. Was the superintendent of the company present at the interviews?

The Witness: On three of the four, no. He brought the men in and left. I might add that in view of that we tabulated that garage or division separately to see if it had made any difference and it had not.



285

By Mr. Awalt:

Q. In other words, you ran a second, practically?

A. We tabulated these results by divisions and on the few interviews that the Division Superintendent was there I made a note. It happened to be when I was doing the interviewing myself. I would like to say that his presence was an impersonal presence, he was wandering in and out and it was an impersonal presence.

We were careful to note and see if it did.

Q. How many operators were interviewed at the four divisions that you specifically mentioned? A. At Western, 65 operators out of 250; Southern Division, 57 operators out of 178; the Brightwood Division, 43 operators out of 101; and the Northern Division, 129 operators out of 378, or a total of 294 operators. This represents a 16.4 per cent sampling of the 1,796 capital transit operators who have operated a radio-equipped vehicle.

Q. In your opinion, does the percent of operators interviewed at these divisions fairly measure the ratio of all operators' opinions? A. Yes.

Q. What was the result shown by this survey? A. 95.9 per cent of the operators answered that there was no interference with the proper and safe operation. That was in direct answer to the question, "Do you think that the radio interferes in anyway with the proper and safe operation of your vehicle?" 95.9 of the operators answered no.

Mr. Harrison: These conclusions which you gave stated on page 7 of Exhibit No. 5?

The Witness: They are stated in there, I am not sure of the page. Yes, it is the last page.

Two per cent were qualified in their answers and two per cent felt that safety was impaired. 88.1 had no personal objections to operating radio equipped vehicles when asked the question, "Do you personally have any objection to operating a radio-equipped vehicle?" Only 3.4 said they had objections and 8.5 voiced reservations.

On the question of, "Do you think radios make your job more pleasant?" 74.5 felt it made their job more pleasant with the radio; 8.5 said sometime and 41.1 said they didn't know. 1.7 said "No difference," and 13 said radios did not make the job more pleasant.

I would like to add here that one of the things, sort of an occupational hazard in the research business is what we call getting a cheap yes.

To avoid that on this question we asked them in what way or how. In other words, if they were unable to substantiate their yes, it wouldn't have been counted.

By Mr. Awalt:

287 Q. In number of operators, how many is 4 per cent? A. 12 operators, sir.

Q. When you say that two per cent or six operators were involved, their answers as to proper and safe, what do you mean? A. They said if the volume became too loud there was a potential threat.

Q. What were the reasons given by the two per cent or six operators who felt safety was impaired? A. Two out of the six thought that normal volume on the radios interfered, four of the six thought that if and when the volume became too loud, that is, above normal, safety of operation was threatened.

Q. Then these two operators who felt that even under normal operations, the radio was possibly a hazard, what percentage is that of the drivers in the whole survey? A. That is less than one per cent.

Q. Well, as a matter of fact, according to my figures it is just a little more than one-half of one per cent, isn't it? A. That is right, sir, .6.

Q. What did the driver say in response to the question, "Generally speaking, do you think that radios make your job more pleasant?" A. The biggest majority said  
288 they liked music, that was 23.4 that said they liked music. The next highest was 12.7 who said, "Music makes the passengers more pleasant," and 12.3 said that

the music was soothing and relaxing to them. 11.5 mentioned time breaks, scores and news. 11.1 said it made the vehicle quieter and accordingly they didn't hear passengers talking. 4.5 said it makes their work less monotonous, 8.2 said it makes the time pass quicker, 7 per cent said they expressly enjoy it when they are laying over at the end of the run, 3.3 said they like the music but claimed they would like a little more variety in program, 2.5 said the music was good but the announcements sometimes got on their nerves.

Then we have miscellaneous reasons down here, "News helps me keep up with things," 1.2 and so forth.

By Mr. Awalt: "

Q. Mr. Doody, on page 6 of Exhibit No. 5 at the bottom I see a reference to the Shriner's Parade and the reference reads: "Over a third (36.1 per cent) of the 294 operators were on duty during the Shriner's Parade. These 106 drivers were asked, 'Do you think the rerouting announcements were helpful to the public in avoiding confusion?' two-thirds (65.1 per cent) answered in the affirmative."

What was the purpose of that? What was the Shriner's

Parade and announcements? A. The purpose of the

289 question was that there had been a lot of talk as to how helpful the transit radio could be in an emergency for routing people around. Here was a chance right at the time of the survey where during the parade WWDC made announcements, while not on specific lines, their announcements were something to the effect that bus lines on streets would be detoured to certain other avenues. They gave a complete route of the parade and mentioned how the specific lines would be affected.

So, we asked the operators if they were helpful in any way. The Yes votes said, 65.1 and although we didn't ask them how, I would say a good third of the operators volunteered comments, like "We are not asked so many questions. There is less confusion."

*Cross-Examination*

By Mr. Harrison:

291 Q. I want to ask you one further question about this survey. Did you do any personal observation yourself on the streetcars or busses as to what you thought might be the effect of the broadcasts either on the operators or the riders? A. Yes, I was here during the entire week of the survey, here instructing our investigators, going out with them. In fact, everybody, regardless of the amount of their experience, were required to go out and get ten interviews and bring them back before we gave them any quotas to see if they were handling it properly.

In introducing some of our personnel into this work it was part of my work to ride the vehicles.

Q. Did you notice any sounds from the radio that would overcome the street signals, automobile horns, policemen's whistles? A. No, I did not, sir.

Q. Did you observe that it was so loud that it interfered with conversation between passengers? A. No, sir, and I might further add that it didn't interfere with our questioning of passengers.

Q. You did make some surveys on the vehicles themselves? A. Yes.

Q. Did the persons being interviewed find any  
292 difficulty in hearing your questions or did you find any difficulty in hearing their answers? A. No, sir.

Q. Did you have to speak in such a loud tone that you would annoy people sitting in the seat behind or in front of the one being interviewed? A. No, sir.

\* \* \* \* \*

315 Donald O'Neill was called as a witness and, having been first duly sworn, was examined and testified as follows:



*Direct Examination*

By Mr. Dowd:

Q. Would you state your name and address for the  
316 record, please? A. Donald O'Neill, 62 Greenwood  
Road, Montclair, New Jersey.

Q. What is your occupation, Mr. O'Neill? A. I am program director of the Franchise Division of Muzak Corporation.

Q. How long have you been associated with Muzak? A. Thirteen years, since its inception in New York in 1936.

Q. What are your duties with Muzak at the present time?  
A. As program director I have supervision over and direct responsibility for all of the musical programs distributed by Muzak throughout the country. This responsibility involves the selection and grouping of music for programs to hotels, restaurants, banks and other offices, to factories and other industrial accounts; for our programs to radio stations for transit broadcasts. It involves programs furnished to a number of railroad and steamship companies.

My duties also include the compilation of music libraries used in transit broadcasting and for individual industrial, office and restaurant subscribers beyond the reach of our wire services as well as the additions of new music to these libraries each month.

As a member of our music committee, I participate in the determination of the music and the type of orchestra  
317 to be used each month for recording new additions to our libraries.

Q. Just what is the principal business of Muzak? A. Muzak Corporation consists of three major divisions. First is the transcription division which is engaged in the recording and manufacture of transcriptions and phonograph records for ourselves and for others; second, there is an Associated Program Service Division which maintains a library of transcription music released to standard radio stations here and abroad; third, there is the Franchise Division which is engaged in the musical programs by wire in



some 70 cities in the United States and its possessions, Canada and Mexico. This division also deals with the various programs and libraries listed in reply to the question under duties and responsibilities.

Q. You referred to a radio broadcast library. Is the Transit Radio library your regular radio broadcast station library? A. No sir, it is not. It is different from the library the Associated Program Division supplies to standard broadcast stations.

Q. How and why and what is the library that you furnish for Transit Radio broadcast? A. The library which we furnish to Transit broadcast stations is made up of the music drawn from our functional library. It is music that is designed for use in work or other types of installations. It differs from standard radio music in being considerably less highly arranged and being more simple than the type of music which is customarily heard on standard radio stations.

Q. What were the primary considerations in the creation of this Transit Radio library? A. As the oldest and perhaps the largest source of functional music in the country, it has been natural for us to follow the development of transit broadcasting with a considerable degree of interest. From our analysis of music used in this business we believe the type of functional music in which we have specialized is ideal for this purpose. We design our library to include non-distracting music so that all musical tastes are represented in amounts roughly proportional to the anticipated likes and dislikes of the projected audience.

Q. What are the chief characteristics of the musical selections that are placed in the Transit Radio library? A. First and most important, whether the selection is concert, semi-classical or popular, the melody is emphasized throughout. All of the concert and semi-classical music is performed by orchestras usually called the "Salon" type, made up of approximately 15 to 20 musicians. Violins and other stringed instruments predominate in these combinations over woodwinds and brass. The popular music

319 is performed by popular dance type combinations of wood winds and brasses tempered in many instances by the addition of a string section. All the arrangements are generally full with no solo performances; swing and jazz are avoided as well as heavy symphonic music. Brass instruments are muted. Extreme changes of dynamic level have been excluded. Throughout simplicity of treatment has been the keynote with enough tonal coloring to keep the music from becoming drab and uninteresting.

Q. Mr. O'Neill, were you present during the testimony yesterday? A. Yes, sir.

Q. You heard some of the references to the music used by WWDC-FM? A. Yes.

Q. Some of those terms, which I will repeat, were brassy, jive, bebop, boogie woogie. In any of the music included in the Transit Radio library selections of that type? A. In the library there are some selections that might be termed jazzy. These, however, happen to be on particular discs and are not used for program purposes. Otherwise, there is definitely no bebop, there is no jazz.

Q. Could any of the music be called brassy? A. No, sir.

320 Q. As I understand your previous testimony, the brasses are muted for the most part? A. That is right. In other words, brass as an instrument is not emphasized at any point. Usually they have either mutes in them or they are kept so much subdued and in the background that frequently they are not perceptible.

Q. You have no instances, for example, where Henry Armstrong would take off on a trumpet solo? A. No, sir. Those are characteristics which do not fit in with our concept of functional music.

Q. What steps, if any, do you take to make certain that your quality in this library will be maintained? A. We select all our own arrangers and artists to score and perform in the manner we want. We record them in our own studio, using the best equipment available and in so far as

the program is concerned, we maintain a very highly trained staff of personnel.

Q. Incidentally, what type of recordings are these? A. These are electrical transcriptions recorded vertically as against a lateral recording which is characteristic of phonograph records.

Q. What is the fidelity of your vertical recordings? A. Not being an engineer, I can not give too much of a definite answer on that. It ranges, as I understand, from approximately three or four hundred cycles to at least 10,000.  
321 It exceeds by all means in the upper end and lower end the mechanical means of reproducing that music.

Q. Does the average person have musical likes and dislikes? A. Definitely. This has been shown conclusively by our own research studies and by the investigations of many investigators. It may be stated that the average person has strong likes and dislikes in music. Furthermore, he will accept as a matter of course the music he likes but will protest vigorously that which is personally distasteful. It has been our experience that a favorable comment freely offered is a rarity compared to the number of unfavorable comments. Every indication we have reveals better than 95 per cent acceptance of music on the part of our audience.

Q. Do I understand from that that in your experience people who object to something are more apt to protest than those who like it? A. Yes, people who dislike music are much more prone to object verbally or in writing than those who do not object or who like the music.

Q. As a part of your research work, has Muzak Corporation developed a statistical method for evaluating likes and dislikes? A. Yes. Every study we have made includes

322 likes and dislikes. Those are both carefully tabulated and listed. They enter into the planning of all our programs. For purposes of statistical measurement we have developed a merit index to express in one figure the likes and dislikes of our audience. Types of music that have a low merit index rating are excluded.

Q. It is on the basis of this statistical analysis that you indicated previously that 95 per cent of the audience found your musical libraries acceptable? A. I would say that is true.

Chairman Flanagan: May I ask a question on that point on the likes and dislikes?

Mr. Dowd: Yes.

Chairman Flanagan: I wonder if this witness would have any explanation for the fact that a large number of people who profess to be music lovers violently object to music of this type on the ground that it violates their private rights.

Mr. Dowd: If the witness has an opinion, I shall be glad to have him express it.

The Witness: Well, I can't answer from a legal standpoint. I will say this, that the reaction of most people to music is based on association. Generally speaking, people with a high musical training do not care too much for the more popular forms of music. By popular I mean dance music, operetta music, types of music of that sort.

323 That of course is strictly an objection that stems from their background, from their association with other types of music.

Chairman Flanagan: Do you have an extensive musical background yourself?

The Witness: I have, of course, studied musical theory since I have been with Muzak. I have studied piano. I have dabbled in many phases of the business. I do not claim, however, to be a professional musician.

By Mr. Dowd:

Q. You stated, did you not, that your library used for Transit broadcasting did not contain symphonic music? A. That is right.

Q. With reference to your answer to the Chairman, do I understand then that perhaps people with a high degree of musical training, a higher percentage of those people would like symphonic music than would the average listeners? A. That is right.



Q. Your library does not include symphonic music? A. No, sir.

Q. So those people who like it might not like the type of music in this library? A. That is right. In relation to the business of likes and dislikes as it affects Washington, I might say—and this has nothing particularly to do with symphonic music as such but the program in general—that in the actual operation of Transit broadcasting Mr. Strouse and his staff have bent over backwards to keep the music and the program both pleasing and soothing. We furnish WWDC-FM with the same program that is now being used in several other cities. At the express wish of Mr. Strouse, we are indicating those selections in his program which by any stretch of the imagination can be deemed too loud, too jazzy or too brassy for the specific requirements of the Washington audience. It is our understanding that these selections are being eliminated from the program actually broadcast here.

Q. Where music is introduced as a new element in a surrounding, whether it is industrial, office or factory, how long does it generally take before it is accepted by the people in those surroundings as a part of the normal condition? A. It takes a period of approximately four to eight weeks before the music becomes part of their working conditions. In other business, that is in our functional programs in factories and other things, before we make surveys we prefer to wait approximately three months.

Q. Have you made any survey or have you any figures to show an increasing acceptance of musical background among factories, offices, restaurants and other types of installations? A. I have some figures here on the music or the acceptance of music in offices as well as in factories.

Q. Would you give those figures, please? A. In response to the question "Do you like music while you work?" we received the following percentage of favorable responses in the past four years: In 1945, 77.3; in 1946, 93.2; in 1947, 94.5; and in 1948, 95.5.



Q. That is the percentage in offices where you had a musical background installation? A. That is right.

Q. How about your industrial plants? A. From industrial plants the same question produced these figures, favorable ideas: In 1945, 80.8 per cent; in 1946, 89.2 per cent; in 1947, 93.6 per cent; and in 1948, 94.9 per cent.

Q. Do these figures indicate that the longer the music is there the greater number of people accept it and appreciate it and want it while they work? A. I would say those figures tend to support that statement.

Q. Now in your installations where you have made these studies do you have or have you ever had a 100 per cent acceptance by the people in question? A. To the best of my knowledge, this has never happened. There is always a small minority of from 2 to 4 per cent who object to the

326 use of music in industry and a number in proportion who are indifferent. So far as we know, there is no means of overcoming this small opposition. However, we derive considerable satisfaction from the fact that the overwhelming majority of our audience is highly favorable to our music and also from the knowledge that whether they want it or not, the small minority who object derive subconsciously the benefits of our functional music.

Q. Have you made statistical studies upon which you have based that conclusion? A. Yes sir, we have studies, as I stated, ranging back to early 1945. This is a continuing part of our operation.

Q. Do those studies then indicate that from the objective analysis such as efficiency or the release of fatigue or tension, that more people benefit than like the music? A. That is true. There is a general increase in the efficiency from objective studies. I think the average is approximately 12 per cent. There have been cases where it runs as high as 45 per cent.

Q. So that the benefits of the music are not always necessarily the same as the subjective likes and dislikes? A. That is true.

361 Ben Strouse was called as a witness and, having been first duly sworn, was examined and testified as follows:

*Direct Examination*

By Mr. Dowd:

Q. Will you please state your name for the record? A. Ben Strouse.

Q. What is your occupation, Mr. Strouse? A. Vice-president and general manager of Capital Broadcasting Company, 1000 Connecticut Avenue, and I am president of Washington Transit Radio, Inc.

Q. Do you know, as president and director of Washington Transit Radio, whether any of the stockholders of Washington Transit Radio are officers or employees of Capital Transit Company? A. They are not.

Q. What is the relation between Washington Transit Radio and Capital Transit Company with respect to the installation of radio receiving equipment? A. Washington Transit Radio, Inc. has a contract with Capital Transit Company for the installation and maintenance of FM receivers in street cars and buses of Capital Transit Company and also has a contract with a radio station which in turn enables them to provide for a satisfactory program service for reception in such vehicles.

Q. What station is now giving such service? A. WWDC-FM.

Q. Is there any contractual restriction which would make it necessary that WWDC-FM furnish these programs? A. No, there is not. Arrangements could be made with any other radio station.

Q. To furnish similar type programs? A. To furnish similar type programs, yes sir.

Q. What was the primary motive of Washington Transit Radio with respect to entering into this contract with Capital Transit Company? A. Primarily it was a commercial venture from which we hope to gain a profit.

Q. If your primary motive was commercial venture, why were you interested in determining whether the public in general desired or wished to accept this type of service?

A. I don't believe any commercial venture has a chance of success unless it has public backing or public acceptance. Certainly no advertising medium does.

Q. Did you try to control or influence the surveys that were made on behalf of Capital Transit Company and Washington Transit Radio? A. Not at all. The original survey which Mr. Giddings referred to was sort of an informal thing made by George Washington University students on which we got 92 per cent acceptance. That was made way back with one experimental bus and one experimental street car. The Dobby survey was made in April. At that time we were particularly anxious to find out whether we had public acceptance. At that time  
364 we had 20-odd installations. If the public did not like Transit Radio and did not want it, that was the time for us to get out of the business. We were particularly anxious to know the real truth then and as a result we not only made no attempt to influence Mr. Doody—not that we could, but we were hoping he would lean over backwards to be perfectly fair in his survey. We wanted to find out, it was our advantage to know.

385 Q. Mr. Strouse, you testified that the primary motive of Washington Transit Radio in entering this enterprise was that it was a commercial enterprise. There has also been testimony on behalf of Transit Radio, Inc., and Washington Transit Radio, Inc. as to the other cities in which installations have been permitted. Could you seek to inform yourself as to whether there were any cities in which installation had been refused by the competent municipal authorities? A. Mr. Pollak, I am a member of the Board of Directors of the National Company of which Mr. Taft who was a witness the other day is Chairman. I don't know all of the affairs of that company only those that come



up at the directors' meetings. I do not know, however, of any case where municipal authorities or anyone else has refused transit radio.

I think Detroit the issue is still up in the air, but I don't think it was actually turned down. But I don't know that for certain, sir.

*Cross-Examination*

By Mr. Pollak:

397 Mention has been made of the factor of safety, Mr.

Strouse, particularly with reference to the public advantage in their being a means whereby direct communication can be made from Capital Transit Company to the drivers of its vehicles.

Perhaps you are not the witness to whom I should put this question but my question is, for that purpose, would it not be possible to make installations which are very much cheaper than the present installations? A. I would like to answer you, Mr. Pollak, by describing a visit I made to the Pentagon Building to talk with the Liaison Committee on Civil Defense. I talked to Colonel Beers, who is chairman of that committee and Colonel Stanford, who is communications officer. They were very much interested in transit radio, interested in all types of mobile radio, one-way and two-way. They asked me for a complete

398 list of cities where transit radio operated.

They told me of use for which transit radio could be used in emergency which we had never realized ourselves, sir. Some of those uses are services that can be used in broadcast servicing.

For example, Colonel Stanford brought out that news casts during times of extreme emergency could be used to control panics and for "Panic-control," which is the phase he used. There are also many other uses.

Drivers could be asked to deposit citizens at certain parts of the city for ambulance duty. The drivers and the public

could be informed to leave certain areas of the city. In all, they gave me 7 possible emergency uses that as I say, we had never realized ourselves.

399 **Frank F. McIntosh** was called as a witness and having been first duly sworn was examined and testified as follows:

*Direct Examination*

By Mr. Dowd:

Q. Will you state your full name for the record, please?

A. Frank F. McIntosh, Consulting Engineer, with offices at 710 - 14th Street, Northwest, Washington, D. C.

Q. When you say you are a consulting engineer, what type of consulting engineer is that? A. I handle matters of acoustics in connection with radio and television.

Q. Mr. McIntosh, what is your educational background?

A. I am a graduate of Electrical Engineering of the University of Nebraska. I have a Masters Degree from M. I. T. in Cambridge.

400 Q. How long have you been engaged in acoustical radio and electronic engineering matters? A. I have been associated as a member of the technical staff of the Bell Telephone Laboratories for eight years at which time I was in the developmental group, research group, and the installation groups. The work I engaged in there was the electronic design, acoustic material design for studios, acoustic measurements, installation of radio and television stations, aircraft stations and the like.

Q. Were you ever employed in the government? A. I was employed during the war as Director of the Radio and Radar Division, Foreign and Domestic Branch, which handled, of course as you know, all the electronics for the Army, Navy and civilian uses. That period lasted until 1944 when I left to form my own business. Between the time I worked for Bell Laboratories and the time I went to the War Production Board, I was the sales engineer for the 12



Western States of Gray Bar, Western Electric equipment and then for a year and a half—that lasted four years—a year and a half after that, or for a year and a half after that, I was the director of station operations of the Fort Industries Company, which headquarters at Toledo, Ohio and handled matters of six broadcasting stations.

I am a part-owner of the Muzak franchise setup in Cincinnati, Ohio where we dispense music to industries, 401 restaurants, hotels and the like.

I operate, besides the consulting business, in Silver Spring, I have a laboratory where research and development work is done and also where we manufacture on a relatively small scale a number of electronic products.

Q. Have you appeared as an expert witness on matters of this sort in the past? A. I have appeared in every form of engineering work in connection with studio and television design, yes, sir.

Mr. Dowd: Mr. Chairman, I offer Mr. McIntosh as an expert witness and wish to request that his qualifications be conceded.

Mr. Pollak: No objections.

Chairman Flanagan: Very well.

By Mr. Dowd:

Q. Mr. McIntosh, do you have any connection with Capital Transit Company or Transit Radio? A. My only connection is that I was asked to make some measurements on some of their vehicles. I have no other connection.

Q. Is it possible to measure the noise level at any given point or in any given situation? A. Yes, sir; it is.

Q. For instance, in this room, could you measure the noise level in this room? A. Yes, sir; it can be 402 done.

Q. How would such measurement be made? A. Such measurements are made with calibrated pressure measuring equipment. There are several companies that make this, among them being General Radio, Sound Appa-

ratus Incorporated, General Electric, and Homer H. Scott now have that.

Q. Did you make such a measurement pursuant to your employment by Washington Transit Radio? A. Yes, I did.

Mr. Dowd: Mr. Chairman, I request that the Exhibit entitled, "Report" be marked for identification as Exhibit No. 13.

Chairman Flanagan: It may be so marked.

(Document above referred to, Exhibit No. 13, was marked for identification.)

By Mr. Dowd A

Q. Mr. McIntosh, I call your attention to what has been marked for identification as Exhibit No. 13. Will you please state what that exhibit purports to show? A. This is a summation of the measurements that were made in a number of streetcars and busses to indicate the absolute sound levels that could be obtained there during various parts of the day and on different vehicles. The exhibit is somewhat self-explanatory, we believe.

403 Just to clarify, the first column shows the car or bus number that was measured. The next column shows the position in the car in which the measurements were made, the front being up near the driver and the middle being about in the center of the car and the rear being about, of course, within six feet of the rear.

The next double column is headed "Car in Motion," and the first of this double column is "Car noises with radio on." The second column was without the radio on. These measurements were made in the accepted and well-known terms of decibels and db stands for decibels. db is roughly speaking about the smallest increment of increase or decrease in audio level that your ear can obtain or understand or recognize. The ear does not hear arithmetically, that is, twice the pressure on the ear does not give you twice the sensation of the sound. Your ear is logarithmic in its hearing and there have been a world of measurements made

to establish the general characteristics of the ear and they have been published throughout the literature of the country.

Dr. Fletcher of Bell Laboratories is one of the leaders who have published books on speech and hearing and those associated with him have contributed to that information.

Q. May I interrupt there? When you say that the ear does not hear logarithmically, what would be the situation if you had a given volume of sound, for instance, 404 a piano and you were to double the number of pianos, what increase in the sound level would there be as measured in decibels? A. If you assume a double sound energy level, you would have a three db increase in db.

Mr. Pollak: A what?

The Witness: If the power level was doubled the db increase would be three db.

By Mr. Dowd:

Q. In other words, if you had a sound level of 50 decibels, you would have to add another sound of 50 decibels in volume in order to increase the total volume to 50 decibels? A. You would have to have the same wattage component as the original sound to increase the db.

Mr. Pollak: Would you repeat that, please?

The Witness: In order that the sound level was increased 3 db, the power in the sound would have to be doubled. In other words, going from 50 db to 53 db, requires that twice the energy or twice the power is contributed to the sound waves. That is a very fortunate thing. If it was not for that, we would all be going crazy everytime somebody tooted their horn or hit a bell or slapped a book down on the table. Those peak energies may be many, many times greater for a very short instance.

405 By Mr. Dowd:

Q. When I interrupted, Mr. McIntosh, you had explained that the first two columns represented the noise

level with the car in motion. Now the third column represents the noise level with the car standing still with the radio on? A. The third column is the car in motion with the car noise and with the radio on.

Q. I mean the last column to the right. A. The last column to the right is the streetcar standing still and the radio going.

Q. I notice that in the first two columns there is very little difference between the noise level at any given position in the vehicle except for 5239. Was 5239 a bus? A. 5239 is a bus.

Q. Then 1511, 1558 and 1127 were streetcars? A. Yes.

Q. In those vehicles the noise level when the car was in motion was the same measured in decibels in all positions?

A. Yes, sir; pretty much, sir.

Q. In the bus, when the bus was in motion the rear of the bus was much noisier than the front and middle of the bus?

A. That was due to the fact that the motors are located at the rear of the bus and the average intensity measured higher there.

Q. In the last column to the right I notice that in each case the noise level as measured in decibels is less at the front of the car than in the middle and rear of the car. A. Well, in all cases that we checked we found that the actual noise level was slightly less right behind the driver than in the other positions of the car.

Q. In those cases the radio was on? A. Whether the radio was on or not; it seemed slightly less there.

Q. But when the car was in motion the sound level throughout the car was the same, measured in decibels, and I also notice that that is true whether the radio was on or not? A. Yes, because the actual energy contributed by the radio was so small that it was not possible on an averaging meter to measure the difference. It is just that small. The reason you can hear these things is not necessarily a matter of straight energy. It is a matter of where your mind works. You can differentiate between sounds or you get used to a sound and put it out of your mind.

For example, like the rumble of a streetcar going out-  
 side your house. Some people cannot sleep the first  
 407 night visiting someone where streetcars go by but  
 after a while your mental processes are such that you  
 exclude those sounds so that they don't disturb you exces-  
 sively.

In listening to things you hear the things you want to  
 hear. Everybody has experienced the business of people  
 talking to them and having them turn right around and ask  
 you what you said. Any new sound you have you are going  
 to hear for a while.

Q. Upon the basis of measurements that you made and  
 your experience in this field, would you say that the radio  
 when the car is in motion, with the radio in operation, that  
 the radio in any way prevents anyone from hearing any-  
 thing that he would otherwise hear; that is, if the radio  
 were off? A. No, sir; I don't believe that it is possible to  
 provide enough energy through a radio sound system that  
 you could economically put in a car to mask out other  
 sounds.

Q. Assuming that the car noise without the radio is 54  
 decibels, what power would be needed, how loud would the  
 radio have to be, before you would override the car noise?

A. Well, the power increase, the sound energy increase,  
 assuming that the radio at the time of competition was giv-  
 ing the same amount of energy out as the noise, in other  
 words, there was a 3 db increase in the sound level as a

408 result of the radio which was not the case in these  
 measurements, but for the purpose of getting a base  
 from which to make a computation, we have to as-  
 sume something that might be logical. You would have  
 to increase the power 1000 times in order to completely  
 mask or do what a masking job of 30 db, which is consid-  
 ered a minimum ratio for masking.

Q. Do I understand from that then, that in order for one  
 sound to mask or override completely another sound, it  
 must be 30 decibels above the other? A. 30 db is the as-



sumed ratio for masking. In other words, the first sound then becomes a very minor one and the one to which you are listening is the controlling one.

Q. Now in view of the fact that the measured sounds or the measured volume of sound in decibels is the same whether the radio is on and without the radio on, how do you explain that you can hear the radio? A. As I said before, the ability of your mind to pick out what you want to listen to and differentiate against sounds, is one of the faculties that we are provided with.

Q. And if a new sound such as radio is introduced into your normal streetcar noises, would that sound become more noticeable than the noises to which the ear is accustomed? A. Yes, sir, any new sound attracts your attention until it too occupies that place in your head that all the

Q. Is it also correct to conclude from your exhibit 409 that the increase in the sound from an average of anywhere from 44 to 64 decibels, depending on which one you were measuring and when, that the increase between the rate of the noise level with the car standing still and the car in motion is due to some factor other than the radio? A. Yes, sir.

Mr. Dowd: That is all on direct.

*Cross Examination*

By Mr. Harrison:

Q. I want to ask Mr. McIntosh if the last column on Exhibit 13 represents the measurement of sounds of the car itself? A. The car was standing still during that measurement and the measurements show all the sound that was entered in the car, whether it was coming from the car or coming from noises outside the car.

Q. I take the bus, No. 5239, was the motor of the bus operating at that time? A. In an idling position.

Q. What about the streetcars? Were the motors of the cars operating at this time? A. Of course the motor is standing still and does not turn. You are probably referring to an air pump or something of that kind.

410 Q. I don't know what it is. A. Frankly, I don't recall whether the air pump was operating or not.

Q. The compressors, I am informed. A. The compressors.

Q. Could you measure that sound apart from the radio sound? A. The radio sound, frankly, this chart shows that the radio sound was so small that we couldn't measure it apart from the other sound. The amount of energy contributed by the radio was so small compared to the energy contributed by other noise sources that that was not possible. Whether or not the compressors could be measured separately from other street noises, I think that would depend on how close you were to the compressors.

Q. Are you able to state from Exhibit 13 what the measurement in decibels is of the radio itself when it was in operation? A. No, sir; that was not attempted. The other noises were so great that we couldn't measure the music.

Q. In other words, you could not separate that from other noises? A. No, sir.

Q. Are you able to state whether or not any of these measurements of sound are measurements of sound that came from outside the vehicle? For instance, traffic on the streets? A. Well, I would say a good part of this noise is traffic from the street, particularly when the car is standing still.

411 Q. Did you take any measurement on the street outside the vehicle? A. Yes, we did, as indicated in the two columns below. The noises indicated at 14th and F Streets on two days were 50 db one day and the next day 60 db.

Q. That is, the ordinary street noises? A. That is right.

443 **Ross H. Beville** was called as a witness and having been first duly sworn was examined and testified as follows:

*Direct Examination*

By Mr. Dowd:

Q. Would you state your name for the record? A. Ross H. Beville.

Q. Will you state your connection with the Washington Transit Radio, please? A. I am a member of the Board of Directors, a stockholder and chief engineer of this Company as well as WWDC.

Q. What are your duties as chief engineer of the Washington Transit Radio? A. My responsibilities as chief engineer of the Washington Transit Radio include responsibility for developmental and experimental work which included the installation of the first two receivers here in Washington in March of 1948 at which time we were determining the requirements of such a system for installation in mobile equipment and of course the feasibility and public acceptance of such a system.

I also serve as a member of the Engineering Advisory Committee to the National company, Transit Radio, Inc., with headquarters at Cincinnati and my more direct responsibility at the moment is responsibility for the installation and maintenance of the receivers installed in Capital Transit Company vehicles here in Washington.

Q. What equipment is used in the bus and streetcar installations here in Washington? A. The major components of the equipment is an antenna, a receiver and six speakers with the associated wiring.

Q. Why are six speakers used? A. The choice of six speakers was not just a chance selection. That was the result of some of the experimental work that was done over a year ago. At one time we considered the use of one speaker and we gave up the idea of the single one due to the fact that always in a case of that kind the sound level at the point of origin is much higher than several feet away.

In order to get a uniform distribution of sound throughout the vehicle or through the latter two-thirds or three-

quarters of the vehicle we chose six speakers as equally well spaced as construction details of the vehicle would permit. We more or less deliberately though neglected to distribute the sound as well in the front of the vehicle as we did in the latter two-thirds or rear of the vehicle for the reason that we didn't wish to have the sound 445 level as high at the operators point, where he sits, as it would be at the back of the bus or the latter three-quarters of the bus or streetcar as the case may be.

Q. Were you present at the time we had the testimony as to the measurements made and the introduction in evidence by Mr. McIntosh of those measurements? A. I was.

Q. Those measurements bear your findings out as to the distribution of sound level insofar as the radio is concerned as regards the front, middle and rear of the bus? A. Yes, the acoustical measurements as made by Mr. McIntosh and as listed on his exhibit there will show that there is from four to six decibals differential between the sound level beginning about ten or twelve feet back in the bus to the rear as compared to the operator's portion.

Q. That can only be determined when the bus is standing still, however. A. Yes, I believe that is correct. As I remember the measurements when we were making these measurements the sound level created by the street noises and created by the vehicle itself exceeded and was by far the dominant sound in the vehicle.

Under those conditions, of course, then the sound at the operator's position would be greater than the lower radio sound which in that case would then more or less 446 blank out the radio.

Q. How is the volume level which is now being used determined? A. That was also done experimentally, over a year ago. We first had a committee which made more or less the selection of the volume level. That committee was composed of members of the Capital Transit Company staff and also of the WWDC staff.

Q. Who headed up the staff of the Capital Transit Company? A. As I recall Mr. Giddings was there and Mr.



Savage who is an engineer in the mechanical division of the Capital Transit Company.

Q. They participated in these tests where you determine the sound level to be used? A. Yes. Of course there was also the operator of the vehicle that was there.

That was only the first test. We took a bus because at that time that was the only vehicle that we were installing receivers in. That was in February, in fact, it was on February 10 or 9 of this year, 1949. We had a bus that we drove over various terrain or various streets which we thought would be representative of the streets in Washington and at various speeds. We determined from that,

we increased the level of the volume and decreased it until we finally found a point that we felt was the best compromise. After making this determination and all agreeing that it was probably the best sound level, the set was removed from the vehicle and put back on the test bench at which time the voltages that were set up by sound reproduction from the receiver were measured.

We took that then and used that more or less as a standard. Since then, however, we have continued to experiment and we have found to a large extent that we have readjusted this level downward, not a great deal but some, for more comfortable or we feel, more comfortable listening level and still we are able to have a reasonable degree of intelligibility both in music and speech.

Q. Now you use this volume that you determined on the bench as your base volume level and then I understand that you make adjustments as the installations go in? A. Let me go a little further on that. We have measured innumerable receivers; that is, after our men have gotten on streetcars and busses and they have asked operators, they have asked passengers, whether or not they felt that the volume level was approximately right, and if they felt it was too high, they would readjust it and ask them, "Now, do you think it is all right?" And more or less let the passengers or operators tell them when they think the level is approximately right.



448 Then we would take those sets out and measure them. The thing is that we have averaged the measurements of, oh, I would suppose 100 receivers to come out with the standard level that we have now.

Now after getting this standard level we adjust all receivers as they go across the test bench to that standard level. Then to answer your question, minor variations, that is, we make minor adjustments on the vehicle when the receiver is installed to compensate for any noise conditions that might be existent on a particular vehicle.

As shown in Mr. McIntosh's exhibit, some vehicles are noisier than others and necessarily if that is true, there must be a slight variation in the standard sound level that we have established.

On the other hand, there are some that are quieter than others and we adjust those downward.

Q. When you set the volume and made these adjustments, does that volume remain? Is there any variation in the operation of the set after that is once done? A. Of the receivers that we have removed from service and have repaired them due to some minor fault one way or the other, we have measured these sound levels and I don't believe in any case have we ever found that the sound level has ever varied except under conditions which would cause it such as mechanical failures or tampering. We have

449 had some cases of tampering and we have had, as in any equipment, mechanical or electrical, you have some failures.

Q. Well now, what is the greatest period of mechanical failures; that is, when they are first installed or after they have been in or when? A. Always, in any new equipment, new installation, you have more or less a shake-down cruise. Any equipment that is installed is more likely to fail during the first few hours or possibly few days of operation that it is apt to do after you have gotten to the point where in the trade we call it "got the bugs out."

Q. Is it your testimony that once this shake-down cruise

has been completed on each net set that the mechanical failures which might cause variations or sets to operate improperly becomes considerably less? A. Oh yes. In fact, we feel that many of the complaints that have been received by the Commission and ourselves and Capital Transit Company have been as a result of these so-called shake-down periods.

There is no way you can avoid it. You can't anticipate what it will be. We do everything in the world we can to prevent these failures but in case of a failure the set may go completely dead or in some cases the level of the set may rise a few decibels.

Q. I recall early in the testimony that Mr. Sager  
450 testified that in July he rode a vehicle which he thought was too loud. Were you making any installations in July and August? A. The major portion of the installations was made in July and August.

Q. Of the 200-some odd sets? A. Yes. We ran 21 or 22 vehicles for a period of several months for test and then beginning just about July 1, we started on more or less mass installations.

Q. Mr. Beville, do you have any system of maintenance checks on these receivers once they are installed? A. We have a most elaborate test and check system. We are able to check every radio-equipped vehicle in the Transit Company system at least once a week and usually—not usually but sometimes two, three or four times a week.

Q. You have men on the street engaged in that? A. Yes.

Q. What provisions are made in handling mechanical failures which occur between these maintenance checks?

A. The Transit Company operators report those to the Transit Company which in turn report to us.

Q. How do you handle cases of complaints that are turned in between your periods of maintenance checks, between these periodic checks? A. For example, if the  
451 complaint is one of the nature that, say for example, if we received a complaint that the set is a little too

loud, in most cases, if the set is too loud, you would find that the operator or inspector had turned it off if it was actually causing annoyance.

On the other hand, there are degrees of loudness. If a set may be just slightly loud in the opinion of the operator but not serious enough to turn off, he may report that and we may have a man there. Well, after we receive the report of the difficulty we will have the man on the job or dispatched to the job within 15 or 20 minutes.

Q. You say there is a method of turning off the sets though in the event the operator feels that they are operating too loud to permit safe operation of the vehicle? A. There is an emergency switch provided for that purpose.

Q. Do you handle or investigate complaints that are received from any other source than Capital Transit Company? A. Yes, those complaints are reports that we receive from people other than those working for Capital Transit Company and WWDC which are just as valuable as if we had employed someone to tell us that the set is not operating properly. We investigate any specific complaint that gives us enough information to track down the vehicle, we investigate as quickly as we can.

452 Q. Mr. Beville, is there any difference in the median sound level, measurable sound level, between the radio sets when they are operating on voice and music?

A. The measurable difference acoustically is hardly discernable. You apparently are referring to the notion, or rather there is information to the effect that we raise the voice levels on commercials higher than we do on any other program material. It is hard to answer this question definitely one way or the other due to the fact that a voice the average person the average power contained in voice modulation is much less than the average power contained in music which has a more sustained or sustaining type of material than the voice would have and, therefore, the average power of the voice is much less.

It is a known fact that noise affects more adversely speech than it does music and that being the case you must

raise to some extent the voice under given noise conditions to make speeches intelligible as music, you must raise it slightly. However, that is only electrically within the receiver.

Measurably, acoustically, you can't tell the difference.

Q. May I ask there whether the measurements that were made—were you present at the time the measurements were made by Mr. McIntosh, which he introduced? A.

Yes.

453 Q. Did those measurements include measurements while the car was having both speech and music?

A. Yes, those measurements were made over a period of hours. The measurements were made under the supervision and direction of Mr. McIntosh and some by him entirely. I was present there and the average readings were as was listed there in the testimony. That continued, for example, one of the measurements that was made, I believe the streetcar was boarded at the corner of 17th and K Streets and measurements were made continually all the way from I Street to the end of the Mt. Pleasant line.

That being the case you were able to come up with an average and of course there were many voice announcements as well as music during that period. We were unable to find that there was any difference, measureable difference acoustically, in the voice and the music.

That is the reason, for example, that you must change the gain of a receiver slightly. It is a compensating device is what it is. A compensating device is something that makes up for deficiencies in the original circuits or original system and there are deficiencies in the system when it comes to speech and, therefore, you have a compensating device which simply raises the speech level to the same point as the music level and makes it equally intelligible.



# Capital Transit Company Exhibit No. 1.

## AGREEMENT

This agreement made this 13th day of December, 1948, by and between Capital Transit Company, hereinafter sometimes referred to as Capital, and Washington Transit Radio, Inc., hereinafter sometimes referred to as Radio,

## WITNESSETH:

*Whereas*, Capital operates certain street cars and busses within the Washington metropolitan area and, as a part of its service to its patrons, desires to make available to them music, news and other entertainment and to secure revenue from advertising; and

*Whereas*, and for this purpose, Radio is desirous of installing and maintaining the equipment necessary to receive audio communications by electronic means in the street cars and busses owned and/or operated by Capital;

*Now, Therefore*, in consideration of the mutual covenants herein contained, it is agreed:

## I

## DEFINITIONS

Wherever used herein, the following terms shall be deemed to have the following meanings:

(1) *Audio*. The term "audio" shall mean a system of broadcasting sound messages unaccompanied by visual messages.

(2) *Television*. The term "television" or "visual" shall mean visual messages accompanied by sound messages related thereto.

(3) *Right of first refusal*. "Right of first refusal" shall mean Radio's right to meet a bona fide written offer made by another to Capital. It must be exercised within thirty (30) days of written notice thereof from Capital to Radio.

(4) *Notice*. Wherever "notice" is required in this Agreement, it shall be made in writing and transmitted via registered mail to Capital at its main office, 36th

and M Streets, N. W., Washington 7, D. C., and to Radio at 1000 Connecticut Avenue, N. W., Washington, D. C., unless either party by written notice to the other specifies a different place.

(5) *Receivers.* "Receivers" shall mean FM radio broadcast receivers and their necessary auxiliary equipment including loudspeakers, designed for satisfactory service in mobile equipment, such as is operated by Capital.

(6) *Broadcast station.* "Broadcast station" shall mean a radio broadcasting station whose programs are received over the equipment installed by Radio in Capital's facilities for those hours of operation during which programs are so received.

(7) *Capital's facilities.* "Capital's facilities" shall include street cars, busses, terminal facilities, waiting rooms and division headquarters owned and/or operated by Capital within the Washington metropolitan district.

(8) *Annual gross transit income.* "Annual gross transit income" shall mean the total broadcast revenue collected by Broadcast Station during each twelve (12) month period for the periods of time during which programs were received over the equipment installed in Capital's facilities, after any usual and customary sales and agency commissions paid, which shall, in no event, exceed thirty per cent (30%) of the cost to the purchasers of time. A radio installation shall be deemed to exist whenever equipment has been installed by Radio in a vehicle which is in regular use, or other facility of Capital; the installation shall be deemed to have occurred in any month during which actual installation was completed prior to the fifteenth (15th) day thereof.

## H

### RADIO'S EXCLUSIVE RIGHT TO INSTALL AUDIO RECEIVING EQUIPMENT

Radio shall have the exclusive right to install, maintain and use equipment designed to receive audio communications by electronic means, including any and all equipment required in connection therewith, in Capital's facilities and

to provide for the reception of programs over such equipment during the term of this Agreement. This shall not restrict Capital's right to install radio equipment for the purpose of transmitting orders and information to its employees, or for any other purpose not reasonably within the scope of this Agreement.

### III

#### INSTALLATION, MAINTENANCE AND OPERATION OF EQUIPMENT

All receivers shall be acquired, installed, repaired and maintained by Radio at its own expense.

(3) ~~Periodic~~ *Periodic Inspection of Equipment.* Radio shall make periodic inspections of and maintain all the radio equipment installed by it in good operating condition, replacing all broken or defective equipment. Radio shall have no obligation to make any repairs of its equipment which becomes defective between regular inspections unless Capital shall have notified it that any such equipment is out of order.

(4) *Manner and Time for Maintenance and Repairs.* Radio shall do all work of installation, maintenance, adjusting, replacing and removal of radio equipment in such a manner and at such times as will not interfere with the regularly scheduled operation of the vehicles, provided that Radio shall not be deemed to have breached its undertaking with respect to installation, maintenance or repairs if it has been unable to gain access to the vehicles in question for adequate periods of time. Capital shall, at its own expense, provide competent personnel to advise Radio with respect to installations, insofar as the installations require modification or alteration of Capital equipment. The placement of equipment shall be a matter of mutual agreement, it being understood, however, that neither party shall unreasonably withhold consent. Radio shall pay to Capital its cost of repairing any damage done to its facilities in

connection with the installation, maintenance and repair work promptly upon rendition of bills for the same. Whenever any radio equipment is permanently removed from any facility, Radio will pay to Capital its cost of restoring any part thereof affected by such removal to a condition equal to that of the remainder of the facility at the time of such removal, promptly upon rendition of bills for the same.

(6) *Notice Concerning Repairs.* Capital shall notify Radio promptly whenever any radio equipment is out of order.

(7) *Control of Receiving Equipment.* Radio shall have full control over the time or times of day that its radio equipment shall be operated, and Capital shall not turn off or disconnect the radio receiving system in any vehicles while it is operating on a regularly scheduled route, except when in the opinion of the operator of any such vehicle the radio equipment is not operating properly or the nature of the material being broadcast will jeopardize the operation of the vehicle according to normal standards of safety, except when such vehicle is involved in an accident, and manual switches will be provided therefor. In all other instances, sets shall be turned on and off by Radio by electronic or other automatic means. It is expressly understood that the provisions of this paragraph shall not apply to equipment in vehicles operating under charter, which equipment may be turned on or off in the discretion of Capital.

#### IV

#### BROADCAST SERVICE TO BE RENDERED

In order to comply with its obligations hereunder, Radio will contract with a broadcast station for programs to be received in Capital's facilities for a minimum of eight (8) hours per day except Sundays. Radio warrants, and as a condition precedent hereto agrees, that no contract shall



be entered into by Radio with any Broadcast Station for programs which does not include the following provisions and warranties:

(a) Program content shall be of good quality and consonant with a high standard of public acceptance and responsibility, it being understood that all programs shall be carefully planned, edited and produced in accordance with accepted practices employed by qualified broadcasting stations.

(b) Commercial announcements shall not exceed sixty (60) seconds in duration, and cumulatively shall not exceed six (6) minutes in any sixty (60) minute period.

(c) Broadcast Station shall agree to cancel or suitably to modify any commercial continuity upon notice from Capital that said continuity, or the sponsor thereof, is objectionable. Broadcast Station shall further agree that it shall give notice to Capital within twenty-four (24) hours after the acceptance of each new sponsor.

(d) Capital is to receive without charge fifty per cent (50%) of the unsold time available for commercial continuity as provided in sub-section (b) hereof, (said free time not to exceed three (3) minutes in any sixty (60) minute period), for institutional and promotional announcements. All such announcements shall be subject to approval by Broadcast Station and all such time is subject to sale without notice.

(e) Broadcast Station shall agree to indemnify and hold Capital harmless from any and all damages and claims for damages arising out of material broadcast by Broadcast Station. Capital agrees to notify Radio and Broadcast Station immediately whenever such claims for damages are made and Broadcast Station shall have the right to defend or compromise any suit, claim or controversy.

(f) Broadcast Station shall submit within sixty (60) days of the close of each twelve (12) month period as hereinafter described an audit of its annual gross transit income as hereinbefore defined, prepared by a certified public accountant, and upon request by Radio or Capital, shall forthwith make available for inspection all its books of account and underlying data, specifically including cancelled checks and bank statements.

(g) Broadcast Station shall be authorized to operate as a Class B (Metropolitan) or C (Rural) FM station, or their equivalents, assigned to the City of Washington, D. C.

## V

## COMPENSATION

(2) *After Initial Period.* From and after the expiration of the initial ninety (90) day period provided for in Part III, Section (1) herein, compensation from Radio to Capital for each twelve month period thereafter shall be at the rate of Six Dollars (\$6.00) per month per radio installation, or on the following basis, if total compensation thereunder is higher:

*Where Gross Transit Income  
for the 12-month Period is  
between:*

*Payment Due Shall Equal:*

\$ 0 and \$100,000	10%
\$100,000.01 and \$200,000	\$ 10,000 plus 20% of the am't above \$100,000.01
\$200,000.01 and \$400,000	\$ 30,000 plus 33% of the am't above \$200,000.01
\$400,000.01 and \$500,000	\$ 96,000 plus 35% of the am't above \$400,000.01
\$500,000.01 and \$600,000	\$131,000 plus 45% of the am't above \$500,000.01
more than \$600,000.01	\$176,000 plus 50% of the am't above \$600,000.01

(3) *Interim Payments.* In order to keep payments from Radio to Capital reasonably current, monthly cash payments are to be made as follows: At the end of each month, Capital shall give Radio a written report of the number of radio installations in regular use during that month. Within ten (10) days thereafter, Radio shall pay Capital Six Dollars (\$6.00) for each such radio installation. After the end of each three (3) month period, Radio shall submit to Capital an audit which will include gross transit income for the preceding quarter, and a cash adjustment between the parties will be made by using a projected gross annual transit income determined by assuming that the said income for the balance of the twelve (12) month period will be at the same rate as actually occurred over the preceding three (3), six (6), or nine (9) month period, as the case may be. Said projected sum shall be divided by twelve (12) and multiplied by three (3), to determine the quarterly payment due in accordance with the schedule of charges provided for hereinabove. In making payments at the end of each such period, due allowance shall be made for previous payments during the preceding portion of each twelve (12) month period.

(4) *Annual Payments.* Within seventy-five (75) days following the end of each twelve (12) month period, a final accounting shall be made, followed by adjustments in cash payment from Radio to Capital or Capital to Radio, as the case may be, based upon the actual gross transit income for the period. Upon request of Capital, Radio shall make available for inspection all its books of account and underlying data, including cancelled checks and bank statements.

## VII

## TERMINATION, CANCELLATION AND RENEWAL

(4) *Unfavorable Public Reaction or Adverse Operating Condition.* In the event operations under this Agreement result in unfavorable public reaction or adverse operating conditions harmful to Capital, Capital shall notify Radio in writing to this effect. Within ten (10) days after such notice, Capital and Radio shall make a joint study and determination of the condition complained of through public opinion surveys, engineering studies, or such other methods as may be applicable and useful. If such condition is verified by these means and Radio is unable to rectify it within thirty (30) days to Capital's satisfaction, Capital may cancel this Agreement upon ten (10) days' notice in writing. In the event the rectification of the said condition requires equipment changes, Radio shall have a reasonable period of time to rectify the condition. It is understood and agreed that if the parties cannot agree on the existence or harm of the condition complained of, or the question of whether it has been properly rectified, such matters shall be submitted to arbitration in accordance with Part XI hereof.

In the event cancellation occurs as above, Capital shall assume the expense of removing the equipment and shall pay Radio an amount equal to the undepreciated value of the equipment, and Radio shall convey title to all of the equipment to Capital. As used in this section, undepreciated value of the equipment shall mean actual cost to Radio of the equipment plus the following representing cost of installation: For sets which have been installed for a period of three (3) years or less, Fifteen Dollars (\$15.00) per set; for those which have been installed more than three (3) years, Ten Dollars (\$10.00) per set.



IN WITNESS WHEREOF, the parties have hereunto  
set their hands and seals this 13th day of December, 1948.

CAPITAL TRANSIT COMPANY,

By E. D. MERRILL,

*President* [Corporate Seal]

Attest:

WM. B. BENNETT,  
*Secretary*

WASHINGTON TRANSIT RADIO, INC. ✓

By BEN STROUSE,

*President* [Corporate Seal]

Attest:

THOMAS N. DOWD,  
*Secretary*

Capital Transit Company Exhibit No. 2.

CAPITAL TRANSIT COMPANY

RATE OF TRAFFIC ACCIDENTS PER 100,000 MILES TRANSIT  
VEHICLES FIRST NINE MONTHS 1949 AND 1948:

	<i>Traffic Accidents</i> 1st 9 Months 1949	<i>Traffic Accidents</i> 1st 9 Months 1948
January	362	431
February	364	447
March	372	382
April	370	338
May	417	302
June	392	319
July	366	303
August	307	291
September	345	327
Total	3295	3140
Total Miles Operated	32,989,133	32,929,018
Rate per 100,000 Miles	9.99	9.54
Increase or Decrease—Plus	.45	

## Capital Transit Company Exhibit No. 3.

## CAPITAL TRANSIT COMPANY

RATE OF TRAFFIC ACCIDENTS PER 100,000 MILES ON RADIO  
OPERATED VEHICLES FROM 2-10-49 TO 9-30-49.

COMPARED WITH SAME VEHICLES FOR SAME PERIOD 1948.

	<i>Traffic Accidents</i>	
	<i>After Radio Installation</i>	<i>Before Radio Installation</i>
February	5	3
March	2	6
April	5	7
May	11	4
June	8	VJ
July	34	30
August	43	48
September	53	48
Total	161	160
Total Miles Operated	1,826,602	1,784,675
Rate per 100,000 Miles	8.81	8.96
Increase or Decrease—Minus .15		

## Washington Transit Radio Exhibit No. 13:

## ENGINEERING REPORT

The following sound level measurements were taken from a random selection of street cars and buses of the Capital Transit Company:

Car or Bus No.	Position in car	Car in Motion		Car Standing with radio on
		Car Noise with Radio	Car Noise without Radio	
1511	Front	54db	54db	44db
	Middle	54db	54db	48db
	Rear	54db	54db	48db
1558	Front	58	58	46
	Middle	58	58	52
	Rear	58	58	52
5239	Front	56	56	48
	Middle	58	58	54
	Rear	60	60	54
1127	Front	70	70	60
	Middle	70	70	64
	Rear	70	70	64

Street noise at 14th and F Streets, N. W., made October 12—50db

Street noise at 14th and F Streets, N. W., made October 14—60db

All readings represent *average* values of sound level above the threshold-of-hearing (.0002 dynes per cm<sup>2</sup>) and were measured with a General Radio Company type 795-B sound level meter, serial No. 1747. The first three measurements were made October 12, 1949, with fair weather conditions and dry streets; the last measurement was made October 14 in rainy weather.



PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA  
Order No. 3612.

In the Matter of Radio Reception in Busses and Street Cars  
of Capital Transit Company.

P. U. C. No. 3490/1, Formal Case No. 390.

On July 14, 1949, this Commission, on its own motion, issued its Order No. 3560 instituting an investigation to determine whether or not the installation and use of radio receivers on the street cars and busses of Capital Transit Company is consistent with public convenience, comfort and safety. At that time, the Company had a number of street cars and busses equipped with radio receivers. It was generally understood that eventually most of the street cars and busses would be so equipped.

After appropriate notice, formal public hearings were held on the subject matter of the order of investigation on October 27, October 28, October 31, and November 1, 1949.

Washington Transit Radio, Inc., and Franklin S. Pollak and Guy Martin were granted the right to intervene and participated throughout the proceedings.

In addition to the participation of People's Counsel and of the interveners, appearance was noted for the Star-Times Publishing Company of St. Louis, Missouri.

Full opportunity was afforded the representatives of citizens and civic associations and of every other interested group, and to every individual present, to express their views respecting the matter before the Commission.

Brief was filed on November 23, 1949, by interveners, Franklin S. Pollak and Guy Martin.

Reply brief was filed jointly by Capital Transit Company and Washington Transit Radio, Inc., on December 5, 1949.

*Positions of the Parties.*

In their joint brief filed on December 5, 1949, Capital Transit Company and Washington Transit Radio, Inc., summarized their position in this proceeding as follows:

(a) That there is no substantial evidence of record showing that the installation of radio receivers on street cars and busses, and their use in reception of the type of program transmitted to them, is inconsistent with public convenience, comfort or safety;

(b) That the probative evidence of record is overwhelming in showing that there is no element of lack of safety involved in such installation and use of radios, and that the large majority of the transit riding public accept, and enjoy, and benefit by the programs received thereon;

(c) That individual or small minority group objections or contentions, based upon asserted rights, under the First or Fifth Amendments, to privacy, freedom of speech, liberty, and property, and dislike for the programs, in the Capital Transit Company vehicles available for public use, are without merit and are irrelevant to any issues in this proceeding arising out of the statutory powers of the Commission; and

(d) That this proceeding should be dismissed for want of evidence to sustain any lawful action by the Commission.

Interveners, Pollak and Martin, summarized their arguments in their brief filed on November 23, 1949, in the following manner:

(1) The use of radio receivers in the circumstances of this case deprives riders of freedom to listen or not to listen, in violation of the First Amendment to the Constitution, and deprives riders of liberty without due process of law in violation of the Fifth Amendment to the Constitution.

(2) The use of radio receivers in the circumstances of this case takes the private property of riders for private use in violation of the Fifth Amendment to the Constitution.

(3) Apart from constitutional questions, the use of radio receivers in the circumstances of this case is inconsistent with public convenience, comfort and safety because of the effects of the broadcasts on a significant number of riders and operators.

(4) The approval of these broadcasts by a majority of the riders and a majority of the operators is irrelevant.

*Problem Before This Commission.*

The investigation conducted and the evidence presented at the formal public hearings held on the subject of the installation of radios in the street cars and busses of Capital Transit Company must, of necessity, be considered by this Commission strictly in the light of its jurisdictional powers. The extent of these powers was indicated in the notice of investigation issued by the Commission on July 14, 1949, wherein the purpose of the investigation was defined as being the determination as to whether or not the installation and use of radio receivers in street cars and busses is consistent with public convenience, comfort and safety.

The Commission's decision on such issues must rest upon a basis more tangible than impassioned pleas which reflect personal feelings either in favor of or against radios in transportation vehicles.

As indicated above, one of the requirements contained in the Act which is administered by this Commission is that every public utility operating within the District of Columbia must furnish service and facilities that are reasonably safe. This Commission is given authority by such Act, after hearing upon its own motion or upon complaint, to direct such changes in equipment or condition of the vehicles of common carriers as are necessary to promote the comfort or convenience of the public. It was to these questions that the Commission's investigation was directed.

*Summary of Testimony.*

The record shows that, as of October 15, 1949, there were 212 radio sets installed in the Company's street cars and busses, and that it is contemplated that a total of 1500 sets will be installed.

On December 13, 1948, the Company entered into a contract with Washington Transit Radio, Inc., which provides, among other things, that the radio receiving equipment will be installed and maintained by Transit Radio without cost

to Capital Transit Company. Washington Transit Radio, Inc., in turn, has a contract with radio station WWDC-FM covering program service for reception in the vehicles of Capital Transit Company.

As indicated hereinabove, all interested parties were given full opportunity to express their views. At the beginning of the hearing, resolutions submitted to this Commission by the Federation of Citizens Associations and certain of its member associations were listed, and representatives from such associations were permitted to expand the views expressed by their groups. The Federation of Citizens Associations went on record as favoring the retention of radios in street cars and busses, as did the North Washington Council, which represents about 22 different associations, and the National Federation of Federal Employees, Local No. 2. Other associations favoring music on transportation vehicles included the Northeast Businessmen's Association, Inc., and the National Association of Letter Carriers. As to the individual Citizens' Associations which filed resolutions with this Commission, three expressed opposition to radios and 15 were in favor of their retention. A group of 43 persons, designating themselves as the Transit Riders Association, registered their opposition.

In general, the objections raised by individuals who attended the hearings to radios in transportation vehicles were based upon the following reasons, among others:

It interfered with their thinking, reading or chatting with their companions; it would lead to thought control; the noise was unbearable; the commercials, announcements and time signals were annoying; the music was of the poorest class; the practice deprived them of their right to listen or not to listen; they were being deprived of their property rights without due process; their health was being impaired; the safety of operation was threatened because of the effect of radios upon the operators of the vehicles.

Having in mind the salient points of public convenience, comfort and safety, the Commission has given very care-



ful consideration to the testimony bearing on these factors.

Captain Loraine T. Johnson, representing the Police Department of the District of Columbia, analyzed for the record statistics covering traffic accidents since July 7, 1949, in which street car and buses were involved and stated that, in his opinion, radio-equipped vehicles do not enter into the traffic picture at all.

William H. Voltz, Planning Engineer of the Department of Vehicles and Traffic, stated that, in the absence of any evidence that radios in motor vehicles have been a contributing factor in traffic accidents, the Department, which he represented does not now consider such installations to be a traffic matter.

The Engineering Bureau of this Commission, through F. A. Sager, Chief Engineer, concluded that when the radio is properly tuned safety of operation is not impaired due to the operation of the radio.

Employees of Capital Transit Company charged with the supervision and instructing of street car and bus operators testified that they have not found, in the performance of their duties, that the reception from radios interfered with their operation of the vehicles nor with the safety of their operation. These witnesses also testified that it was apparent that reception over the radio speakers did not affect the safety of operation by other operators observed by them as instructors or supervisors. Further, the witnesses stated that the radio reception does not interfere with the ability of the operator to hear street signals, such as policemen's whistles and auto horns.

It was the opinion of the operators that music on the vehicles had a tendency to keep the passengers in a better mood, and that it simplified transit operations.

An analysis of the accidents involving street cars and buses reflects the fact that the radio does not in any way interfere with efficient operation and has not been the cause of any accidents, according to the testimony of a Company witness who is a safety supervisor.

A public opinion survey was conducted by Edward G. Doody & Company, from October 11, 1949 to October 17, 1949, in order to determine the attitude of Capital Transit Company customers toward transit radio. Their survey employed the rules of random selection and was confined to interviews aboard radio-equipped vehicles. The principal results obtained through the survey, as presented in this record, were as follows:

Of those interviewed, 93.4 per cent were not opposed; that is, 76.3 were in favor, 13.9 said they didn't care, and 3.2 said they didn't know; 6.6 per cent were not in favor, but when asked the question "Well, even though you don't care for such programs personally, would you object if the majority of passengers wanted buses and street cars equipped with radio receivers," 3.6 said they would not object or oppose the majority will. Thus, a balance of 3 per cent of those interviewed were firmly opposed to the use of radios in transit vehicles.

Testimony presented by Frank F. McIntosh, Consulting Engineer, related to absolute sound levels obtained in a number of street cars and buses. The measurements were taken by Mr. McIntosh at three points; namely, at the front of the vehicle—near the driver—at the middle of the vehicle, and within about six feet of the rear of the vehicle. Also, the measurements were made while the vehicle was in motion, with and without the radio on, and while the vehicle was standing with the radio on. The measurements were made in terms of decibels, which, roughly speaking, represents the smallest increment of increase or decrease in audio level that the ear can obtain or understand or recognize.

The testimony of this witness was to the effect that the actual energy contributed by the radio was so small that it was not possible on the meter to measure the difference in sound level with the radio on and off. He explained that the reason the radio is heard is not necessarily a matter of straight energy. It is a matter of the working of the

mind; that is, a person can differentiate between sounds or can get used to a sound and put it out of his mind. The witness also testified that it is not possible to provide enough energy through a radio sound system that could economically be put in a car to mask out other sounds.

Other arguments presented for the consideration of the Commission pertained to the use of radios in street cars and buses at times for public purposes, such as the necessary or emergency rerouting of vehicles; the publicizing of public interest enterprises, and for the protection of the public in time of crisis.

#### *Conclusion.*

From the testimony of record, the conclusion is incapable that radio reception in street cars and buses is not an obstacle to safety of operation.

Further, it is evident that public comfort and convenience is not impaired and that, in fact, through the creation of better will among passengers, it tends to improve the conditions under which the public rides.

In the light of these conclusions, it is obvious that the installation and use of radios in street cars and buses of the Capital Transit Company is not inconsistent with public convenience, comfort and safety. For the foregoing reasons,

#### *IT IS ORDERED:*

That the investigation initiated by Commission Order No. 3560 be, and it is hereby, dismissed.

#### *A TRUE COPY:*

N. H. HETZEL,

*Chief Clerk.*

*By the Commission:*

E. J. MILLIGAN,

*Executive Secretary.*

## PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA

Order No., 3631

February 15, 1950

IN THE MATTER OF

Radio Reception in Buses and Street Cars of

CAPITAL TRANSIT COMPANY.

P. U. C. No. 3490/1,

Formal Case No. 390.

**Order Denying Applications for Reconsideration of  
Commission Order No. 3612.**

The Commission has received applications for reconsideration of Order No. 3612 from Franklin S. Pollak and Guy Martin, Paul N. Temple, Jr., Transit Riders' Association, Hector G. Spaulding and others, Bernard Tassler for himself and for National Citizens' Committee Against Forced Reading and Forced Listening, and Progressive Citizens Association of Georgetown. Careful consideration has been given to the representations set forth in all of the said applications, and they have been duly considered in the light of the testimony of record before the Commission and its findings and opinion accompanying Order No. 3612. The Commission is of opinion that its findings and opinion and Order No. 3612 are clearly supported by the testimony of record and should be affirmed. For those reasons, the said applications for reconsideration will be denied.

**IT IS ORDERED:**

That the applications for reconsideration of Order No. 3612 filed by Franklin S. Pollak and Guy Martin, Paul N. Temple, Jr., Transit Riders' Association, Hector G. Spaulding and others, Bernard Tassler for himself and for National Citizens' Committee Against Forced Reading and



Forced Listening, and Progressive Citizens Association of Georgetown be, and they are hereby, denied.

A TRUE COPY:

N. H. HETZEL,  
*Chief Clerk.*

By the Commission:

E. J. MILLIGAN,  
*Executive Secretary.*

[fol. 123] Minute entry of argument (omitted in printing).

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# United States Court of Appeals

FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

No. 10777.

FRANKLIN S. POLLAK AND GUY MARTIN, APPELLANTS

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA,  
*et al.*; APPELLEES

Appeal from the United States District Court for the District  
of Columbia

Decided June 1, 1951

*Mr. Paul M. Segal*, with whom *Mr. Franklin S. Poliak* was on the brief, *pro se*, for appellants. *Messrs. Harry P. Warner* and *Quayle B. Smith* entered appearances for appellants.

*Mr. Dargal A. Myse*, with whom *Messrs. Edmund L. Jones* and *F. G. Awalt* were on the brief, for appellee Capital Transit Company.

*Mr. Lloyd B. Harrison*, Counsel, Public Utilities Commission of the District of Columbia, with whom *Mr. Vernon E. West*, Corporation Counsel, D. C., was on the brief, for appellee Public Utilities Commission of the District of Columbia.

*Mr. W. Theodore Pierson*, with whom *Messrs. Vernon C. Kohlhaas* and *Thomas N. Dowd* were on the brief, for appellee Washington Transit Radio, Inc.

*Messrs. Morris L. Ernst*, *James Lawrence Fly*, *Osmond K. Fraenkel*, *Alexander B. Hawes*, *Arthur Garfield Hays*, and *Laurence A. Knapp* filed a brief on behalf of the American Civil Liberties Union as *amicus curiae* urging reversal.

Before EDGERTON, BAZELON, AND FAHY, Circuit Judges.

EDGERTON, *Circuit Judge*: Appellee Capital Transit Company (Transit) operates streetcars and buses in the District of Columbia. In 1948 Transit made a contract with appellee Washington Transit Radio, Inc., (Radio) by which Radio was to install and maintain loudspeakers in Transit vehicles and provide broadcasts at least 8 hours<sup>1</sup> daily except Sunday. In October, 1949, loudspeakers were in

<sup>1</sup> At the time of the Commission's hearing, actual hours of operation were 7 a.m. to 7 p.m.

operation in 212 vehicles and it was planned to increase the number to 1,500.

Though Transit and Radio call the broadcasts "music as you ride", they include not only music but also "commercial, announcements, and time signals". The contract permits six minutes of "commercial announcements" per hour. These vary from 15 to 35 seconds in length and are usually scheduled about once in five minutes, though the interval varies.

Appellee Public Utilities Commission received protests against Transit's use of radio. It ordered an investigation and held a hearing "to determine whether . . . the installation and use of radio receivers on the street cars and busses of Capital Transit Company is consistent with public convenience, comfort and safety . . .". Appellants, who ride Transit vehicles, and other persons and organizations were allowed to intervege and took part in the hearing. The Commission found that transit radio does not reduce safety, "tends to improve the conditions under which the public rides," and "is not inconsistent with public convenience, comfort and safety." The Commission's final order "dismissed" its investigation.

Appellants and others appealed to the District Court from the Commission's order. Appellants' petition of appeal states that appellants are "obliged to use the street cars and busses of Capital Transit Company in connection with the practice of their profession and on other occasions and are thereby subjected against their will to the broadcasts in issue. These broadcasts make it difficult for petitioners to read and converse . . ." Each of the appellees, i.e. the Commission, Transit, and Radio, moved to dismiss the petitions of appeal as not stating claims on which relief could be granted and as not within the court's jurisdiction. The court dismissed the petitions on the ground that "no legal right of the petitioners . . . has been invaded . . ." This appeal followed.

Appellants' chief contention is that Transit radio deprives them of liberty without due process of law in violation of the Fifth Amendment of the Constitution.

1. The jurisdiction of the Public Utilities Commission, the District Court, and this court are clear. All public utilities are required by Act of Congress to "furnish service and facilities reasonably safe and adequate and in all respects just and reasonable" and the term "service" is used "in its broadest and most inclusive sense." D. C. Code (1940) §§ 43-301, 43-104. The Commission is authorized to fix and enforce standards of service. §§ 43-320, 43-303, 43-1002.

Since the Commission's order was its final decision that Transit may use loudspeakers in its streetcars and buses, the order was appealable. "Any . . . person . . . affected by any final order or decision of the Commission, other than an order fixing or determining the value of the property of a public utility in a proceeding solely for that purpose, may" appeal to the District Court and from that court to this. D. C. Code (1940) § 43-705. "Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be reexamined by courts under particular statutes providing for the review of orders." *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401, 408. Since the appellants use the



service of Transit and intervened before the Commission they are "affected by" the Commission's order and may appeal.<sup>2</sup>

2. Transit passengers commonly have to hear the broadcasts whether they want to or not.<sup>3</sup> The Commission made no finding on this point but the fact is well known. It was proved by many witnesses. It is in legal effect admitted by appellees' motions to dismiss the petition of appeal, since the petition states that appellants "are subjected against their will to the broadcasts in issue. These broadcasts make it difficult for petitioners to read and converse . . ." The brief of appellee Radio admits the fact in these terms: "it is impossible to give effect to this alleged right [not to listen] without frustrating the desire of other passengers to listen . . ." Appellee Transit says in its brief: "The record shows that *every precaution is taken* in the installation of the equipment and its maintenance *to minimize the sound level at the operators' position* and to distribute sound evenly throughout the public spaces in the vehicle . . ."<sup>4</sup> WWDC-FM, the transmitting station, advertised in 1949 that Transit Radio was "delivering a guaranteed audience."<sup>5</sup> The passengers are known in the industry as a "captive audience". Formerly they were free to read, talk, meditate, or relax. The broadcasts have replaced freedom of attention with forced listening.

Most people have to use mass transportation. In the District of Columbia this means they have to use Transit and hear the broadcasts. Even as between the District and the adjoining Pentagon region in Virginia the Supreme Court has said: ". . . most government employees, in going to and returning from their work, were compelled to begin or complete their trips by utilizing buses of street-

<sup>2</sup> *Henderson v. United States*, 339 U. S. 816. In *United States v. Public Utilities Commission*, 80 U. S. App. D. C. 227, 151 F. 2d 609, we held that a consumer of electricity and intervenor before the Commission was "affected by" and could appeal from a Commission order fixing electric rates. We said (p. 231): "Congress has used language, throughout the applicable Code sections, indicating an intention that consumers shall have a right to challenge the Commission's actions."

<sup>3</sup> Appellants' supplementary application to the Commission for rehearing contains a physicist's affidavit explaining in technical terms that "the ear hears plainly at its low sound level what the meter does not detect at its high sound level."

<sup>4</sup> Emphasis added.

<sup>5</sup> THE 1949 RADIO ANNUAL, p. 363.

In their supplementary application for reconsideration, appellants referred to "a brochure issued by Transit Radio, Inc.," the corporation described by a witness for Washington Transit Radio, Inc., as the national or parent company. This brochure is entitled "A New Idea—A New Voice—A New Medium for Advertisers—transit radio." Washington is one of the cities concerning which it says: "The advertiser knows how large an audience he is reaching in each Transit Radio city because the rate he pays is based essentially on the actual count of paid passenger fares. No surveys are necessary—guesswork plays no part. . . . Transit radio . . . provides a definitely measurable audience . . . When the studio microphone is switched on for the announcer to read a commercial, the transmitter automatically emits a supersonic note which activates the *voice emphasis circuit* and raises the volume about 25 per cent. The result: *Everyone hears the commercial!* . . . Speakers are mounted on the overhead panels, alternately on the right and left sides, so that every passenger gets perfect reception from a speaker just overhead. If they can hear—they can hear your commercial!" Appellants asked to be permitted to examine concerning the "25 per cent" statement a witness who had testified that "The measurable difference acoustically" between the radio sets when operating on voice and on music "is

cars of Capital Transit." *United States v. Capital Transit Co.*, 325 U. S. 357, 359.

3. Though statutes and the law of torts forbid invasions of liberty by private individuals, the constitutional guarantees of liberty are directed against government action. But acts of individuals are beyond the reach of these guarantees only when they are "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings." *Civil-Right Cases*, 109 U. S. 3, 17. For example, since *Smith v. Allwright*, 321 U. S. 649, was decided a state cannot "by permitting a party to take over a part of its election machinery . . . avoid the provisions of the Constitution forbidding racial discrimination in elections . . ." *Rice v. Elmore*, 165 F. 2d 387, 339 (C. A. 4th). A private corporation that owns the streets of a town may no more abridge the freedoms of press and religion than a municipality regularly organized. *Marsh v. Alabama*, 326 U. S. 501, 506. The Supreme Court has recently said: "When authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." *American Communications Ass'n v. Douds*, 339 U. S. 382, 401.

The forced listening imposed on Transit passengers results from government action. By authorizing Transit and forbidding others to operate local streetcars and buses, Congress made it necessary to ride the vehicles in which Transit makes it necessary to hear the broadcasts. Streetcars and buses cannot operate in city streets without a franchise. Congress has given Transit not only a franchise but a virtual monopoly of the entire local business of mass transportation of passengers in the District of Columbia.<sup>6</sup>

Furthermore the forced listening has been sanctioned by the governmental action of the Commission. If the Commission had found it contrary to public comfort or convenience, or unreasonable, it would have stopped. Because the Commission decided otherwise it continues. To suggest that a "negative" order cannot be the final step in a misuse of government power is to assert a distinction the Supreme Court has repudiated. ". . . An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status." *Rochester Tel. Co. v. United States*, 307 U. S. 125, 142. *Mitchell v. United States*, 313 U. S. 80, 92; *Henderson v. United States*, 339 U. S. 816. Even failure to enter any order may be a denial of constitutional rights. *Smith v. Illinois Bell Tel. Co.*, 270 U. S. 587. By dismissing its investigation

<sup>6</sup> The monopoly is apparently complete except that an interurban line that operates in one part of the District carries local passengers. This line also, according to the testimony, subjects its passengers to forced listening.

Transit was formed under an Act and a Joint Resolution of Congress, by a merger of previously independent lines. Act of March 4, 1925, 43 Stat. 1265; Joint Resolution of January 14, 1933, 47 Stat. 752.

Congress authorized the end of competition and enacted that there should be no new competition except upon a showing exceedingly difficult to make. "No competitive street railway or bus line, that is, bus or railway line for the transportation of passengers of the character which runs over a given route on a fixed schedule, shall be established without the prior issuance of a certificate by the Public Utilities Commission of the District of Columbia to the effect that the competitive line is necessary for the convenience of the public." Sec. 4 of the

the Commission declined to prevent valid action of Congress from having an unintended and unnecessary result.

4. No occasion had arisen until now to give effect to freedom from forced listening as a constitutional right.<sup>6</sup> Short of imprisonment, the only way to compel a man's attention for many minutes is to bombard him with sound that he cannot ignore in a place where he must be. The law of nuisance protects him at home.<sup>7</sup> At home or at work, the constitutional question has not arisen because the government has taken no part in forcing people to listen. Until radio was developed and someone realized that the passengers of a transportation monopoly are a captive audience, there was no profitable way of forcing people to listen while they travel between home and work or on necessary errands. Exploitation of this audience through assault on the unavertible sense of hearing is a new phenomenon. It raises "issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison."<sup>8</sup> But the Bill of Rights, as appellants say in their brief, can keep up with anything an advertising man or an electronics engineer can think of. In *United States v. Classic*, Mr. Justice Stone said for the Supreme Court: "in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses." 313 U.S. 299, 316.

If Transit obliged its passengers to read what it liked or get off the car, invasion of their freedom would be obvious. Transit obliges them to hear what it likes or get off the car. Freedom of attention, which forced listening destroys, is a part of liberty essential to individuals and to society.<sup>9</sup> The Supreme Court has said that the constitutional guarantee of liberty "embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties . . ."<sup>10</sup> One who is subjected to forced listening is not free in the enjoyment of all his faculties.

Both the decision and the opinions in *Kovacs v. Cooper*, 336 U.S. 77, give great weight to the public interest in freedom from forced listening. The Supreme Court upheld a municipal ordinance prohibiting loud and raucous sound trucks in public streets. Mr. Justice Reed's opinion, for three Justices, said (pp. 86-87): "The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality." Kovacs had broadcast, along with music, comment on a labor dispute. He contended that the ordinance abridged his freedom

<sup>6</sup> *Stodder v. Rosen Talking Machine Co.*, 241 Mass. 245, 135 N. E. 251; 247 Mass. 60, 141 N. E. 569; *Fos v. Thomassie*, 26 So. 2d 402 (Cl. Ap. La. 1946); *Five Oaks Corp. v. Gathmann*, 58 A. 2d 656 (Cl. Ap. Md. 1948).

<sup>8</sup> Mr. Justice Frankfurter, concurring, in *Kovacs v. Cooper*, 336 U.S. 77, 96.

<sup>9</sup> "The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners . . ." Mr. Justice Reed in *Kovacs v. Cooper*, 336 U.S. 77, 87.

<sup>10</sup> *Quinn v. University of Louisiana*, 297 U.S. 98, 344.

of speech. The Supreme Court's decision upholding the ordinance means that the public interest in freedom from forced listening is so important as to outweigh even the public interest in making more effective, by amplifying, a communication protected by the First Amendment. It would seem to follow that the public interest in freedom from forced listening outweighs the private interest in making more effective, by amplifying, a communication not protected by the First Amendment. The Amendment does not protect commercial advertising.<sup>11</sup>

Validation of the forced listening involved here would result in this curious paradox. Although a municipality may forbid speech protected by the First Amendment from being broadcast in a street, where no one need hear it more than a few minutes, speech not protected by the First Amendment may be broadcast in a streetcar where passengers must hear it for a substantial time.

Of course freedom from forced listening, like other freedoms, is not absolute. No doubt the government may compel attention, as it may forbid speech, in exceptional circumstances. But a deprivation of liberty to which the government is a party is unconstitutional when it is "arbitrary or without reasonable relation to some purpose within the competency of the State to effect." *Meyer v. Nebraska*, 262 U. S. 390, 400. Forcing Transit passengers to hear these broadcasts has no reasonable relation to any such purpose.<sup>12</sup> Some discomforts may perhaps be inevitable incidents of mass transportation, but forced listening is neither incidental nor inevitable. It deprives the appellants and other passengers who object to the broadcasts of their liberty for the private use of Transit, Radio, and passengers who like the broadcasts. This loss of freedom of attention is the more serious because many people have little time to read, consider, or discuss what they like, or to relax. The record makes it plain that the loss is a serious injury to many passengers.<sup>13</sup> They suffer not only the discomfort of hearing what they dislike but a sense of outrage at being compelled to hear whatever Transit and Radio choose.

Willing hearers are entertained by the broadcasts. But the profit of Transit and Radio and the entertainment of one group of passengers cannot justify depriving another group of passengers of their liberty.<sup>14</sup> The interest of some in hearing what they like is not a right to make others hear the same thing.<sup>15</sup> Even if an impartial survey had shown that most passengers liked the broadcasts or were

<sup>11</sup> *Edentine v. Christensen*, 236 U. S. 52.

<sup>12</sup> The record contains a suggestion that Transit broadcasts might be useful in "panic control" and other emergencies. But one powerful loudspeaker in each vehicle, available for use when needed, would serve any such purpose. The suggestion is no argument for maintaining six loudspeakers in each vehicle and operating them 12 hours a day.

<sup>13</sup> Objection to forced listening is not limited to people who dislike radio. One objecting witness said: "I have three radios in my house and I have three reasons for liking them. The first reason is that you can always turn them off. The second one is that you can choose your program and the third is that you can regulate the volume."

<sup>14</sup> Withdrawing this particular entertainment will no more deprive willing hearers of liberty than excluding a man from a particular place imprisons him.

<sup>15</sup> The Chairman of the Commission said at the hearing: "The decision of the Commission will be made on the numbers of those saying 'I like it' and those



willing to tolerate them on the supposed chance of a money benefit,<sup>16</sup> that would not be important, since the will of a majority cannot abrogate the constitutional rights of a minority. Moreover there is no evidence that any large group of passengers actually wish to go on being entertained by broadcasts forced upon other passengers at the cost of their comfort and freedom.<sup>17</sup>

5. It has been argued that when freedom of attention is abridged, freedom of speech and press are abridged, and that when Transit sells the forced attention of its passengers to Radio for advertising purposes it deprives them of property as well as liberty. Also, it may well be doubted whether Transit can perform its statutory duty of providing comfortable service for all by giving more than comfortable service to some and less than comfortable service to others. But we need not consider these issues. In our opinion Transit's broadcasts deprive objecting passengers of liberty without due process of law. Service that violates constitutional rights is not reasonable service. It follows that the Commission erred as a matter of law in finding that Transit's broadcasts are not inconsistent with public convenience, in failing to find that they are unreasonable, and in failing to stop them.<sup>18</sup>

This decision applies to "commercials" and to "announcements". We are not now called upon to decide whether occasional broadcasts of music alone would infringe constitutional rights.

6. Congress has provided that after hearing an appeal from the Public Utilities Commission the District Court "shall either dismiss the said appeal and affirm the order or decision of the Commission or sustain the appeal and vacate the Commission's order or decision." D. C. Code (1940) § 43-705. Counsel for the Commission contend that to vacate its order "would be an ineffectual thing, leaving the status quo as it existed prior to the initiation of the investigation", and that if constitutional rights are invaded it "may be the basis for suit for injunction under the court's general equity powers, but it is

<sup>16</sup> The Commission did not find and nothing in the record suggests that Transit gets enough money from the broadcasts, in relation to the number of its passengers, to have any possible effect on fares.

<sup>17</sup> An organization employed by appellees Transit and Radio to make a survey of passenger sentiment failed to ask persons who said they favored transit radio whether they would still favor it if they knew it caused serious annoyance to a substantial number of passengers. Yet this survey did ask persons who said they opposed transit radio whether they would still object if the majority approved. To investigate the altruism of the objecting group and not that of the approving group reflects bias and produces a biased result. Moreover the survey did not inquire into the intensity of likes and dislikes. It ignored the question how many persons have been induced by the broadcasts to use Transit less, or more, than formerly.

All persons interviewed were passengers on radio-equipped vehicles. According to the report 76.3% said they favored radio, 13.9% did not care, 3.2% "didn't know", and 6.6% objected but 3.6% said they would not oppose the majority will. An unbiased inquiry which did not claim to be scientific produced a different result. On November 6, 1949 the Washington Post printed two "ballots", one reading "Yes I favor radio broadcasts in streetcars and buses" and the other "No I do not favor radio broadcasts in streetcars and buses." On November 13, 1949 the Post reported that of the 5,402 ballots returned, 2,387 favored the broadcasts and 3,015, or 55.8%, did not.

<sup>18</sup> The fact that administrative agencies may not consider issues involving the constitutionality of congressional action is irrelevant since there is no such issue

not a proper basis for an appeal from the Commission's order." In our opinion these contentions are erroneous and the appellants need not sue out an injunction. To say that they "must institute another and distinct proceeding, would be to put aside substance for needless ceremony." *Smith v. Illinois Bell Tel. Co.*, 270 U. S. 587, 591.

The Wagner Act provided that a Circuit Court of Appeals might enforce, modify and enforce, or set aside, an order of the National Labor Relations Board.<sup>19</sup> It did not provide that a court might remand a cause to the Board for further proceedings. But in *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 372-373, the Supreme Court held that "If the court itself had set aside the findings and order of the Board . . . the court could have remanded the cause for further proceedings in conformity with its opinion. . . . The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements. The statute with respect to a judicial review of orders of the Labor Relations Board follows closely the statutory provisions in relation to the orders of the Federal Trade Commission, and as to the latter it is well established that the court may remand the cause to the Commission for further proceedings . . ." Similarly in *Federal Power Commission v. Pacific Power & Light Co.*, 307 U. S. 156, 159-160, in holding that a Court of Appeals had jurisdiction to review a Power Commission order declining to authorize a transfer of corporate assets the Supreme Court said: "it is urged that . . . the court itself cannot lift the prohibition of the statute by granting permission for the transfer, nor order the Commission to grant such permission. And so it is claimed that any action of a court in setting aside the order of the Commission would be an empty gesture . . . But . . . The court has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission. . . . a judgment rendered will be a final and indisputable basis of action. . . ." *Interstate Commerce Comm'n v. Baird*, 194 U. S. 25, 38. In making such a judgment the court does not intrude upon the province of the Commission, while the constitutional requirements of 'Case' or 'Controversy' are satisfied. For purposes of judicial finality there is no more reason for assuming that a Commission will disregard the direction of a reviewing court than that a lower court will do so."

The judgment of the District Court is therefore reversed with instructions to vacate the Commission's order and remand the case to the Commission for further proceedings in conformity with this opinion.

*Reversed.*

[fol. 132] UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1951

No. 10777

FRANKLIN S. POLLAK and GUY MARTIN, Appellants,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF  
COLUMBIA, et al.

Appeal from the United States District Court for the  
District of Columbia

Before Edgerton, Bazelon and Fahy, Circuit Judges

JUDGMENT—Filed June 1, 1951

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the orders of the said District Court appealed from in this cause be, and the same are hereby, reversed, with costs of appellants to be borne by appellees except the Public Utilities Commission, and that this case be, and it is hereby, remanded to said District Court with instructions to vacate the order of the Public Utilities Commission and remand the case to the Commission for further proceedings in conformity with the opinion of this Court.

Per Circuit Judge Edgerton.

Dated June 1, 1951.

[File Endorsement Omitted].

[fol. 123-160] PETITION FOR REHEARING COVERING 28 PAGES  
FILED JUNE 14, 1951 OMITTED FROM THIS PRINT. IT WAS  
DENIED, AND NOTHING MORE BY ORDER.—July 6, 1951.

[fols. 161-166] ANSWER TO PETITION FOR REHEARING—Filed  
June 22, 1951

[Omitted in Printing]

[fol. 167] IN UNITED STATES COURT OF APPEALS

[Title omitted]

Before Stephens, Chief Judge; Edgerton, Clark, Wilbur K.  
Miller, Proctor, Bazelon, Fahy and Washington, Circuit  
Judges

ORDER—Filed July 6, 1951

On consideration of the appellees' petition for a rehearing of the above-entitled case before the Court in banc and of the answer thereto, and a majority of the Circuit Judges of the Circuit having voted against a rehearing herein before the Court in banc, it is

Ordered by the Court in banc that the petition for rehearing before the Court in banc be, and it is hereby, denied.

Per Curiam.

Dated: July 6, 1951.

Circuit Judge Prettyman disqualified himself with respect to the petition for rehearing in banc herein and took no part in the disposition thereof.

[File Endorsement Omitted]

[fol. 168] DESIGNATION OF RECORD

[Omitted in Printing]

[fol. 169] Clerk's Certificate to foregoing transcript omitted in printing.



[fol. 170] SUPREME COURT OF THE UNITED STATES

No. 224, OCTOBER TERM, 1951

[Title Omitted]

ORDER ALLOWING CERTIORARI—Filed October 15, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 171] SUPREME COURT OF THE UNITED STATES

No. 295, OCTOBER TERM, 1951

[Title Omitted]

ORDER ALLOWING CERTIORARI—Filed October 15, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 172] IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

[Title Omitted]

MOTION FOR THE PRINTING OF ADDITIONAL PORTIONS OF THE  
RECORD—Filed October 26, 1951

Franklin S. Pollak and Guy Martin, respondents in No. 224 and petitioners in No. 295, hereinafter referred to as appellees, respectfully move for an order directing the

printing of additional portions, hereinafter specified, of the record in this Court.

1. The additional portions of the record which appellees desire to have printed are part of the record in this Court. They were not printed in the Joint Appendix in the Court below and they are not contained in the printed record served on appellees with the petition for writ of certiorari in No. 224.

[fol. 173] 2. This motion is the only means available for obtaining the printing of the additional portions of the record because counsel for petitioners in No. 224 and respondents in No. 295 (hereinafter referred to as appellants) have refused to stipulate for the printing of these additional portions of the record, while stating at the same time that they will not oppose a motion for this purpose.

3. The additional portions of the record which appellees desire to have printed fall into two categories:

(a) Portions of the record before the Public Utilities Commission. These are a part of the record in this Court by reason of the fact that appellants designated them for certification from the District Court to the Court of Appeals. They consist of:

(i) Testimony and other evidence before the Commission which appellees consider relevant to other evidence already in the printed record here at the instance of appellants or to assertions of fact that were made by appellants in the Court of Appeals and appear likely to be renewed here.

(ii) The certificate from the Secretary of the Commission to the District Court, defining and transmitting the record before the Commission. This is similarly relevant.

(iii) A portion of appellees' prayer for relief before the Commission. This underlies appellees' cross-petition in No. 295.

(b) Designations, motion and order in the District Court which serve to define the record in this Court. These show which of the papers, and which portions of the papers, physically present in this Court, constitute the record in this Court.

4. Appellees did not move earlier in this Court for the relief now requested because they understood, after investigation [fol. 174] of the practice on the point, that this motion did not have to be made in conjunction with the petitions for certiorari, but could be deferred until those petitions were decided.

5. The reason why appellees desire this additional material to be printed in this Court, although they did not designate it for certification to the Court of Appeals or print it there, is that at the time for such designation and printing they were of the view that only the pleadings, and not the evidence, were before the Court of Appeals. Appellants considered that the evidence was before the Court of Appeals. They designated large quantities of it, and printed lesser quantities of it, for that Court, and argued it there extensively in their briefs, and that Court discussed it. The case having so developed, appellees now desire to have printed additional portions of the evidence designated below by appellants, but not printed by them.

6. The portions of the record here which appellees desire to have printed are the following:

1. Excerpts from Testimony of E. C. Giddings, page 156, line 16 to line 18; page 167, line 16 and line 17; page 169, line 4 to line 9.

2. Excerpts from Testimony of Hurlbert Taft, Jr., page 200, lines 2 to 6; page 200, line 21 to page 201, line 10.

3. Excerpts from Testimony of Norman Reed, page 340, line 14 to page 341, line 7; page 342, line 16 to line 23; page 343, line 24 to page 344, line 16; page 345, line 19, to page 346, line 2; page 347, line 10, to page 348, line 2; page 348, line 16, to page 350, line 4.

4. Excerpts from Testimony of Ben Strouse, page 361, line 22 to line 24; page 364, line 8 to line 16; page 370, line 6; page 372, line 15; page 372, line 25, to page 373, line 13.

[fol. 175] 5. Capital Transit Company Exhibit No. 1, to be printed in full, except that the following parts and sections are to be printed by title only, by which is meant that the indicated number is to be printed to-

gether with the immediately-following title, but not the ensuing text:

- a) Section (5) of Part III (page 5);
- b) Sections (5), (6), (7) and (8) of Part V (pages 8, 9 and 10);
- c) Part VI and sections (1) and (2) thereof (page 11);
- d) Sections (2) and (3) of Part VII (page 12);
- e) Part VIII and sections (1) and (2) thereof (pages 14 and 15);
- f) Sections (2) and (3) of Part IX (page 15);
- g) Part XI (page 16);
- h) Part XII (page 16).

6. Excerpts from Capital Transit Company's Exhibit No. 4:

- a) the title page;
- b) On page 8, the last printed paragraph;
- c) All of page 9, except the last three lines;
- d) Page 11, the entire page.

7. Excerpts from Exhibit No. 9 entitled "Station WWDC-FM, Thursday, October 13, 1949":

- a) Pages 1 to 3 inclusive.

8. All of Exhibit No. 10, the first page of which is entitled "WWDC-FM Standard Opening Announcement."

[fols. 176-178] 9. Excerpts from Application of Franklin S. Pollak, Intervener, and Guy Martin, Intervener, for Reconsideration and Other Relief:

- a) heading on title page;
- b) All of page 1 to the end of the first paragraph on page 2.

10. Certificate of the Secretary of the Public Utilities Commission.

11. Designation of Record on Appeal filed July 26, 1950, being pages 44 to 45 of the Transcript of Record in the United States Court of Appeals.



12. Respondent's-Intervenors' Counter Designation of Record on Appeal, filed August 4, 1950, being pages 47 to 49, inclusive, of the said Transcript of Record.

13. Motion to Transmit Record Before Public Utilities Commission to United States Court of Appeals for the District of Columbia Circuit, filed August 24, 1950, being pages 52 to 53, inclusive, of the said Transcript of Record.

14. Order granting the last-mentioned motion, signed by Judge Matthews, filed August 24, 1950, page 55 in the said Transcript of Record.

15. This motion and the order to be entered thereon.

Respectfully submitted, Paul M. Segal, Harry P. Warner, 816 Connecticut Avenue, Washington 6, D. C., Attorneys for Franklin S. Pollak and Guy Martin, Respondents-Petitioners. Franklin S. Pollak, 1333 27th Street, N. W., Washington 7, D. C., Attorney *pro se*.

October 26, 1951

[fol. 179] SUPREME COURT OF THE UNITED STATES

Journal of November 13, 1951

No. 224. Public Utilities Commission of the District of Columbia, Capital Transit Company, et al., petitioners, v. Franklin S. Pollak and Guy Martin; and

No. 295. Franklin S. Pollak and Guy Martin, petitioners, v. Public Utilities Commission of the District of Columbia, Capital Transit Company and Washington Transit Radio, Inc.

The motion of Pollak et al., to print additional portions of the record is granted.

[fols. 1-155] PUBLIC UTILITIES COMMISSION

In the Matter of P. U. C. No. 3490/1. Formal Case No. 390.

Radio Reception in Busses and Streetcars of Capital  
Transit Company

Date: October 27, 1949

[fols. 156-166] E. C. GIDDINGS, was called as a witness and having been first duly sworn was examined and testified as follows:

[fols. 167-168] Cross-examination.

By Mr. Pollak:

[fols. 169-199] Q. Do you know what number of passengers in a year?

A. No, I am sorry, I haven't the figures on that.

Q. What routes do they run, Mr. Giddings?

A. They operate over in the Northeast Section into Bradbury Heights and into Maryland along Pennsylvania Avenue, Alabama Avenue.

Q. Does your company also run a chartered coach service?

A. Yes, sir.

[fol. 200] HULBERT TAFT, JR., was called as a witness and, after having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Dowd:

Q. Do you have any connection with any national organization interested in transit broadcasts?

A. Yes, I do. I am chairman of the Board of Directors of Transit Radio, Inc., which is a national company.

Q. When was Transit Radio, Inc. organized?

[fols. 201-339] A. In 1947.

Q. What is its purpose?

A. Well, it has three purposes. The first was to develop an FM receiver, a crystal controlled FM receiver calculated

to utilize the static-free, fine tone qualities of FM for transmission for use in buses; secondly, to exchange information concerning public reaction, program types and other information regarding the use of radios in buses throughout the country; thirdly, to represent radio stations in the sale of national advertising.

[fol. 340] NORMAN REED, was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Dowd:

Q. Will you state your name and address for the record?

A. Norman Reed, 503 East Thornapple Street, Chevy Chase, Maryland.

Q. What is your occupation?

A. Program Director of WWDC and WWDC-FM.

Q. How long have you held this position?

A. I have been program director of WWDC since the [fol. 341] station first went on the air in May of 1941 and have been program director of WWDC-FM since we first began our FM operation, which was in April of 1947.

Q. In that capacity you have been in direct charge of the programming of WWDC-FM during its hours when those programs have been received on sets of Capital Transit Company?

A. I have.

[fol. 342] Q. Are there any regulations which have been laid down by the station management which you follow with respect to commercial continuity?

A. Yes, there is. Our contract has the provision that there shall be no more than six minutes of commercial copy in any one hour. Our policy is that all announcements, whether commercial or sustaining, be limited to six minutes in any one given hour.

[fol. 343] Q. You state that the total talk, that is both commercial and sustaining announcements, is limited to six

[fol. 344] minutes in any one hour. Is there any policy with respect to the length of any single announcement?

A. Yes. Commercial announcements are limited to a maximum of 35 seconds. They vary anywhere from 15 to 35 seconds but we have set 35 as the maximum limitation.

Q. Now with this 35-second maximum and variation from 15 to 35 seconds, how often do you schedule commercial announcements?

A. In general they are scheduled once in every five minutes. However, to avoid fading out musical selections and to accommodate slight variations in the length of our newscasts, the announcements do not always occur five minutes apart. In some cases less than five minutes; in other instances considerably more, but we do maintain the five-minute average so that at no time will there ever be more than 12 announcements in any one scheduled hour.

[fol. 345] Q. Mr. Reed, on this typical program log you do not indicate commercial announcements or public service sustaining announcements. Where would those announcements appear?

A. Well, time, temperature or newscast is indicated that would accommodate either a commercial announcement or a sustaining public interest announcement.

Q. And those you say would be scheduled every five [fol. 346] minutes?

A. That is right, no more than every five minutes.

[fol. 347] By Mr. Dowd:

Q. Calling your attention to what has been marked as Exhibit No. 9, will you please state what that exhibit purports to show?

A. The first three pages of this exhibit are a composite log for Thursday, October 13 showing in column 1 the actual scheduled time for each newscast or announcement and in column 2 the actual time taken from the transmitter log that such announcement or newscast went on the air. The last four pages of the exhibit list the titles of the musical numbers and the orchestras who made the transcriptions of the music used on October 13 in the order that these selections were made.



Q. You do not indicate the exact time at which the musical selection was played?

A. No. These numbers vary from one and one-half to three and one-half minutes in length and music occupies all [fol. 348] the time in between the announcements or newscasts indicated on the log itself, the first three pages.

Q. I call your attention to Exhibit No. 10. Will you please state what that exhibit purports to show?

A. This exhibit contains all of the copy and continuity that was used on October 13. The copy has been arranged in alphabetical order other than the opening or closing announcements. This represents all copy except the actual newscasts and, as I mentioned before, the weather and temperature reports and the required station identification.

Q. How much time do the weather reports and temperature reports and station identifications occupy?

[fol. 349] A. These are standard format announcements such as, "This is WWDC-FM, Washington, music transcribed," or, "The time is 10:25."

Q. Is it proper to state then that Exhibits No. 9 and 10 truly and correctly reflect the entire program structure for WWDC-FM on October 13 between the hours of 7 a. m. and 7 p. m.?

A. Yes, with the exception, as I mentioned before, of the newscasts, time and temperature and station breaks.

Mr. Harrison: Do you mean by that that it was transmitted to the radios in the buses and street cars, Mr. Dowd?

Mr. Dowd: Yes, the operation of WWDC-FM between the hours of 7 a. m. and 7 p. m. is that which is received over the receivers installed in the Capital Transit vehicles.

By Mr. Dowd:

Q. Does October 13 represent anything exceptional in so far as the programming of WWDC-FM is concerned during these hours?

A. No, it does not. We had previously intended to select other days picked at random as proof of an average day's program but they do not contain any information that would not be covered in this particular exhibit covering the program for October 13 and were therefore omitted since

October 13 was the date that was specified by someone who was not connected in any way with the station.

The public interest spots do vary of course from time to time. At the moment the Community Chest is on. We are [fols. 350-360] giving them about 15 announcements a day. Whatever may dictate the schedule of frequent public interest announcements, we do that at that particular time, so that the public interest spots do show some variation as to content, but this is a typical day.

[fols. 361-363] BEN STROUSE was called as a witness and, having been first duly sworn, was examined and testified as follows:

[fols. 364-369] Q. There has been general discussion with respect to the programs now being received over these radio sets. Would you state what the policy is now and what it will be in the future with respect to the program format?

A. Mr. Reed has described our program pretty effectively. We have no plans for changes in that program. The music is by Muzak, as we have said several times, short newscasts of one and one-half to two minutes, weather forecasts, commercials as described, weather signals.

[fols. 370-371] Cross-examination.

[fol. 372] By Mr. Harrison:

Q. What is the basis or method of charging for a spot?

[fols. 373-369] A. Well, we have adopted the formula more or less nationally although each station sets its own rate, in the neighborhood of \$1 per thousand known riders, which is a very low rate compared to other advertising media. So, if there are 6,000 riders, our spot should sell for around \$6. This is only a rule of thumb. We have rate cards based primarily on how many riders there are in the vehicles.

Q. The number of installations in the street cars and buses would tend to increase your rate per spot as well as increase the revenue to Capital Transit Company?

A. That is correct. All advertising media sell circulation and of course the circulation increases as the number of installations goes up.

## [fol. 570] CAPITAL TRANSIT COMPANY EXHIBIT NO. 1

## Agreement

• This Agreement made this 13th day of December, 1948, by and between Capital Transit Company, hereinafter sometimes referred to as Capital, and Washington Transit Radio, Inc., hereinafter sometimes referred to as Radio,

Witnesseth:

Whereas, Capital operates certain street cars and busses within the Washington Metropolitan area and, as a part of its service to its patrons, desires to make available to them music, news and other entertainment and to secure revenue from advertising; and

Whereas, and for this purpose Radio is desirous of installing and maintaining the equipment necessary to receive audio communications by electronic means in the street cars and busses owned and/or operated by Capital;

Now, Therefore, in consideration of the mutual covenants herein contained, it is agreed:

## I

## Definitions

Wherever used herein, the following terms shall be deemed to have the following meanings:

(1) *Audio*. The term "audio" shall mean a system of broadcasting sound messages unaccompanied by visual messages.

(2) *Television*. The term "television" or "visual" shall mean visual messages accompanied by sound messages related thereto.

(3) *Right of first refusal*. "Right of first refusal" shall mean Radio's right to meet a bona fide written offer made by another to Capital. It must be exercised within thirty (30) days of written notice thereof from Capital to Radio.

(4) *Notice*. Wherever "notice" is required in this Agreement, it shall be made in writing and transmitted via registered mail to Capital at its main office, 36th and M Streets, N. W., Washington 7, D. C., and to Radio at 1000

Connecticut Avenue, N. W., Washington, D. C., unless either party by written notice to the other specifies a different place.

[fol. 571] (5) *Receivers*. "Receivers" shall mean FM radio broadcast receivers and their necessary auxiliary equipment including loudspeakers, designed for satisfactory service in mobile equipment, such as is operated by Capital.

(6) *Broadcast station*. "Broadcast station" shall mean a radio broadcasting station whose programs are received over the equipment installed by Radio in Capital's facilities for those hours of operation during which programs are so received.

(7) *Capital's facilities*. "Capital's facilities" shall include street cars, busses, terminal facilities, waiting rooms and division headquarters owned and/or operated by Capital within the Washington metropolitan district.

(8) *Annual gross transit income*. "Annual gross transit income" shall mean the total broadcast revenues collected by Broadcast Station during each twelve (12) month period for the periods of time during which programs were received over the equipment installed in Capital's facilities, after any usual and customary sales and agency commissions paid, which shall, in no event, exceed thirty per cent (30%) of the cost to the purchasers of time. A radio installation shall be deemed to exist whenever equipment has been installed by Radio in a vehicle which is in regular use, or other facility of Capital; the installation shall be deemed to have occurred in any month during which actual installation was completed prior to the fifteenth (15th) day thereof.

## II

### Radio's Exclusive Right to Install Audio Receiving Equipment

Radio shall have the exclusive right to install, maintain and use equipment designed to receive audio communications by electronic means, including any and all equipment required in connection therewith, in Capital's facilities and to provide for the reception of programs over such equipment during the term of this Agreement. This shall not



restrict Capital's right to install radio equipment for the purpose of transmitting orders and information to its employees, or for any other purpose not reasonably within the scope of this Agreement.

### III

#### Installation, Maintenance and Operation of Equipment

All receivers shall be acquired, installed, repaired and maintained by Radio at its own expense.

[fol. 572] (1) *Initial (90-Day) Period.* Radio shall immediately proceed to install twenty (20) receivers in vehicles suitable for radio installation and program reception, which vehicles shall be designated by Capital upon request, and shall give Capital written notice the day when the twentieth (20th) receiver is installed. Radio shall forthwith cause program transmissions to be received over these receivers for a period of not less than eight (8) hours per day except Sunday, which programs shall be similar in all respects to those which Radio agrees herein to secure for reception over the facilities to be installed under the terms of this Agreement, and shall include commercial announcements in accordance with the standards hereinafter set forth. A period of 90 days following notice of the installation of the twentieth (20th) receiver shall be known as the initial (90 day) period hereinafter referred to.

(2) *Installation Schedule after Initial Period.* Within five (5) years from the date notice is given of the installation of the twentieth (20th) receiver, Radio shall have installed receivers in all vehicles designated by Capital as suitable for radio installation and program reception owned and/or operated by Capital which are in regular use and which have been in the possession of Capital at least ninety (90) days, and in such terminal facilities, waiting rooms, and division headquarters as are designated by Capital. The schedule of installation to be made by Radio and to be permitted by Capital shall be as follows:

(a) Within one hundred eighty (180) days from the date notice is given of the installation of the twentieth (20th) receiver, not less than a total of one hundred (100) receivers.

(b) Within one (1) year from the date notice is given of the installation of the twentieth (20th) receiver, not less than a total of two hundred (200) receivers.

(c) Within two (2) years from the date hereof, Radio shall make every effort to install receivers in all vehicles which are in regular use and are suitable for radio program reception, and in such terminal facilities, waiting rooms, and division headquarters, as Capital shall designate.

[fol. 573] (d) If at any time vehicles in which Radio has installed equipment are withdrawn from regular use, Capital shall give notice of such withdrawal to Radio which, at its sole option, may remove its equipment from said vehicles within thirty (30) days of said notice.

(3) *Periodic Inspection of Equipment.* Radio shall make periodic inspections of and maintain all the radio equipment installed by it in good operating condition, replacing all broken or defective equipment. Radio shall have no obligation to make any repairs of its equipment which becomes defective between regular inspections unless Capital shall have notified it that any such equipment is out of order.

(4) *Manner and Time for Maintenance and Repairs.* Radio shall do all work of installation, maintenance, adjusting, replacing and removal of radio equipment in such a manner and at such times as will not interfere with the regularly scheduled operation of the vehicles, provided that Radio shall not be deemed to have breached its undertaking with respect to installation, maintenance or repairs if it has been unable to gain access to the vehicles in question for adequate periods of time. Capital shall, at its own expense, provide competent personnel to advise Radio with respect to installations insofar as the installations require modification or alteration of Capital equipment. The placement of equipment shall be a matter of mutual agreement, it being understood, however, that neither party shall unreasonably withhold consent. Radio shall pay to Capital its cost of repairing any damage done to its facilities in connection with the installation, maintenance and repair work promptly upon rendition of bills for the same. Whenever any radio equipment is permanently removed from any

facility, Radio will pay to Capital its cost of restoring any part thereof affected by such removal to a condition equal to that of the remainder of the facility at the time of such removal, promptly upon rendition of bills for the same. [fol. 574] (5) *Access to Capital's Equipment.*

(6) *Notice Concerning Repairs.* Capital shall notify Radio promptly whenever any radio equipment is out of order.

(7) *Control of Receiving Equipment.* Radio shall have full control over the time or times of day that its radio equipment shall be operated, and Capital shall not turn off or disconnect the radio receiving system in any vehicles while it is operating on a regularly scheduled route, except when in the opinion of the operator of any such vehicle the radio equipment is not operating properly or the nature of the material being broadcast will jeopardize the operation of the vehicle according to normal standards of safety, or except when such vehicle is involved in an accident, and manual switches will be provided therefor. In all other instances, sets shall be turned on and off by Radio by electronic or other automatic means. It is expressly understood that the provisions of this paragraph shall not apply to equipment in vehicles operating under charter, which equipment may be turned on or off in the discretion of Capital.

#### IV.

##### Broadcast Service to be Rendered

In order to comply with its obligations hereunder, Radio will contract with a broadcast station for programs to be received in Capital's facilities for a minimum of eight (8) [fol. 575] hours per day except Sundays. Radio warrants, and as a condition precedent hereto agrees, that no contract shall be entered into by Radio with any Broadcast Station for programs which does not include the following provisions and warranties:

(a) Program content shall be of good quality and consonant with a high standard of public acceptance and responsibility, it being understood that all programs shall be carefully planned, edited and produced

in accordance with accepted practices employed by qualified broadcasting stations.

(b) Commercial announcements shall not exceed sixty (60) seconds in duration, and cumulatively shall not exceed six (6) minutes in any sixty (60) minute period.

(c) Broadcast Station shall agree to cancel or suitably to modify any commercial continuity upon notice from Capital that said continuity, or the sponsor thereof, is objectionable. Broadcast Station shall further agree that it shall give notice to Capital within twenty-four (24) hours after the acceptance of each new sponsor.

(d) Capital is to receive without charge fifty per cent (50%) of the unsold time available for commercial continuity as provided in sub-section (b) hereof, (said free time not to exceed three (3) minutes in any sixty (60) minute period), for institutional and promotional announcements. All such announcements shall be subject to approval by Broadcast Station and all such time is subject to sale without notice.

(e) Broadcast Station shall agree to indemnify and hold Capital harmless from any and all damages and claims for damages arising out of material broadcast by Broadcast Station. Capital agrees to notify Radio and Broadcast Station immediately whenever such claims for damages are made and Broadcast Station [fol. 576] shall have the right to defend or compromise any suit, claim or controversy.

(f) Broadcast Station shall submit within sixty (60) days of the close of each twelve (12) month period as hereinafter described an audit of its annual gross transit income as hereinbefore defined, prepared by a certified public accountant, and upon request by Radio or Capital, shall forthwith make available for inspection all its books of account and underlying data, specifically including cancelled checks and bank statements.

(g) Broadcast Station shall be authorized to operate as a Class B (Metropolitan) or C (Rural) FM station, or their equivalents, assigned to the City of Washington, D. C.



## V

## Compensation

(1) *Initial (90-Day) Period.* No compensation of any kind shall be due or payable to Capital from Radio for the initial ninety (90) day period provided for in Part III, Section (1) herein, and all compensation hereinafter referred to shall be computed from the date the ninety (90) day period referred to herein expires.

(2) *After Initial Period.* From and after the expiration of the initial ninety (90) day period provided for in Part III, Section (1) herein, compensation from Radio to Capital for each twelve (12) month period thereafter shall be at the rate of Six Dollars (\$6.00) per month per radio installation, or on the following basis, if total compensation thereunder is higher:

Where Gross Transit Income  
for the 12-Month Period is  
between:

Payment Due Shall Equal:

\$ 0 and \$100,000	10%
\$100,000.01 and \$200,000	\$ 10,000 plus 20% of the am't above \$100,000.01
\$200,000.01 and \$400,000	\$ 30,000 plus 33% of the am't above \$200,000.01
\$400,000.01 and \$500,000	\$ 96,000 plus 35% of the am't above \$400,000.01
\$500,000.01 and \$600,000	\$131,000 plus 45% of the am't above \$500,000.01
more than \$600,000.01	\$176,000 plus 50% of the am't above \$600,000.01

[fol. 577] (3) *Interim Payments.* In order to keep payments from Radio to Capital reasonably current, monthly cash payments are to be made as follows: At the end of each month, Capital shall give Radio a written report of the number of radio installations in regular use during that month. Within ten (10) days thereafter, Radio shall pay Capital Six Dollars (\$6.00) for each such radio installation. After the end of each three (3) month period, Radio shall submit to Capital an audit which will include gross transit income for the preceding quarter, and a cash adjustment between the parties will be made by using a projected gross annual transit income determined by assuming that the said income for the balance of the twelve (12) month period will be at the same rate as actually occurred over the preceding three (3), six (6), or nine (9) month period, as the case may be. Said projected sum shall be



divided by twelve (12) and multiplied by three (3), to determine the quarterly payment due in accordance with the schedule of charges provided for hereinabove. In making payments at the end of each such period, due allowance shall be made for previous payments during the preceding portion of each twelve (12) month period.

(4) *Annual Payments.* Within seventy-five (75) days following the end of each twelve (12) month period, a final accounting shall be made, followed by adjustments in cash payment from Radio to Capital or Capital to Radio, as the case may be, based upon the actual gross transit income for the period. Upon request of Capital, Radio shall make available for inspection all its books of account and underlying data, including cancelled checks and bank statements.

(5) *Increased Cost Refund.*

[fol. 578] (6) *Increased Cost Refund—How Determined.*

[fol. 579] (7) *Decreased Cost Refund.*

(8) *Books of Account.*

[fol. 580]

## VI

### Liability and Indemnification

(1) *Capital's Freedom from Liability.*

(2) *Radio's Indemnification.*

## VII

### Termination, Cancellation and Renewal

(1) *Following Initial 90-Day Period.* During a period of ninety (90) days from and after the date of notice of the installation of the first twenty (20) receivers in accordance with Part III, Section (1) herein, Capital shall have an unlimited right to cancel this Agreement upon fifteen (15) days' notice, the last day for giving such notice being the ninetieth (90th) day of said period. Upon notice of such cancellation, all rights of the parties to this Agreement shall terminate except Radio's right of first refusal as hereinafter set forth in Part IX, Section (2), and Capital agrees that it will not enter into any contract providing for audio broadcast reception in its facilities for a period of one (1) year from the effective date of such notice.

[fol. 581] (2) *For Failure to Install Receivers.*

(3) *For Willful Violation of Agreement.*

(4) *Unfavorable Public Reaction or Adverse Operating Condition.* In the event operations under this Agreement result in unfavorable public reaction or adverse operating [fol. 582] conditions harmful to Capital, Capital shall notify Radio in writing to this effect. Within ten (10) days after such notice, Capital and Radio shall make a joint study and determination of the condition complained of through public opinion surveys, engineering studies, or such other methods as may be applicable and useful. If such condition is verified by these means and Radio is unable to rectify it within thirty (30) days to Capital's satisfaction, Capital may cancel this Agreement upon ten (10) days' notice in writing. In the event the rectification of the said condition requires equipment changes, Radio shall have a reasonable period of time to rectify the condition. It is understood and agreed that if the parties cannot agree on the existence or harm of the condition complained of, or the question of whether it has been properly rectified, such matters shall be submitted to arbitration in accordance with Part XI hereof.

In the event cancellation occurs as above, Capital shall assume the expense of removing the equipment and shall pay Radio an amount equal to the undepreciated value of the equipment, and Radio shall convey title to all of the equipment to Capital. As used in this section, undepreciated value of the equipment shall mean actual cost to Radio of the equipment plus the following representing cost of installation: For sets which have been installed for a period of three (3) years or less, Fifteen Dollars (\$15.00) per set; for those which have been installed more than three (3) years, Ten Dollars (\$10.00) per set.

(5) *By Virtue of Order or Decree.* If substantial performance of this Agreement is prevented by final order, decree, or regulation of any court or governmental authority having jurisdiction, the following will obtain:

(a) This Agreement shall become null and void and no rights or liabilities shall accrue to either party to this Agreement, except Radio's right of first refusal specified in Part IX, Section (3) hereinafter; the provisions relating to the

disposition of equipment set out in Part VIII, Section 1 hereinafter; and the remaining provisions of this section.

[fol. 583]. (b) In the event Capital does not exercise its option set forth in Part VIII, Section (1) hereinafter, it shall pay Radio fifty (50) per cent of the depreciated cost of said equipment; said depreciated cost to be computed on a twenty (20) per cent straight line annual basis from the date of installation.

It is understood, however, that the additional payment to be made by Capital pursuant to sub-section (b) above, shall not exceed the total amount paid by Radio to Capital pursuant to the provisions of Part V herein. It is further understood that the net amount realized from the salvage of said equipment, if any, shall be divided equally between Capital and Radio.

(6) *Term of Agreement and Renewal.* The term of this Agreement shall be for a period of five (5) twelve (12) month periods from the date notice is given by Radio of the installation of the twentieth (20th) receiver, as provided in Part III, Section (1) above. It shall renew itself for one (1) additional period of five (5) years, under the same terms and conditions (exclusive of rights of renewal, options and first refusal rights) unless either party hereto gives written notice of termination by registered mail no less than one hundred and twenty (120) days before the date of expiration.

## VIII

### Disposition of Radio Equipment

(1) *Purchase by Capital.*

[fol. 584] (2) *On Failure to Purchase.*

## IX

### Options

(1) *With Respect to Television.* Radio shall have the right of first refusal to meet the terms of any bona fide offer submitted to Capital during the life of this Agreement or extensions thereof which proposes to provide television

broadcasting service subsequent to the life of this Agreement or extension thereof.

(2) *Following Cancellation After Initial (90-Day) Period.*

(3) *Following Termination.*

[cols. 585-586]

## X

### Broadcasts from Station Owned by Capital

Nothing herein contained shall be so construed as to prevent, hinder or limit Capital in using or accepting a program service from a station owned or controlled by it, upon the termination of this Agreement.

## XI

### Arbitration

## XII

### Resolutions

In Witness Whereof, the parties have hereunto set their hands and seals this 13th day of December, 1948.

Capital Transit Company, by (S.) E. D. Merrill,  
President. (Corporate Seal.)

Attest: (S.) Wm. B. Bennett, Secretary.

Washington Transit Radio, Inc., by (S.) Ben Strouse,  
President. (Corporate Seal.)

Attest: (S.) Thomas N. Dowd, Secretary.



[fols. 587-594]

## EXHIBIT No. 4

## Transit Customers and Transit Radio

Public Opinion Study No. 2 Made for Radio Station  
WWDC-FM and Capital Transit Company, October,  
1949

[fol. 595] Those 130 (6.4%) who said their rides were "less enjoyable" with radio were asked, "In what way?". On the following page, the results of October and April are compared. The weight of the overall groups of classified reasons have not particularly shifted. However, it may be noted that 4.6% of these riders attribute their dislike not to radio itself rather to a mechanical feature of broadcast reception, "not properly adjusted". On the other hand, this time we find a 3.1% specifically referring to being "forced" to listen. The importance of "safety hazard" has proportionately declined by half from April.

[fols. 596-597]

Reason	October	April
Total "Less Enjoyable".....	130 = 100.0%	138— 100.0%
Nuisance Value.....	59.2	258.6
Too much noise, confusion.....	19.2	23.2
Want to think, read, study, relax, sleep, talk.....	19.2	21.7
Annoying, nerve-wracking.....	18.5	13.0
Like quiet.....	2.3	.7
Versus Radio.....	28.4	29.0
Don't like programs.....	22.3	24.6
Not properly adjusted.....	4.6	—
Dislike radio.....	1.5	4.4
Imposition on Public.....	6.1	5.1
Forced on passengers.....	3.1	—
Not necessary.....	1.5	2.9
Not proper place.....	1.5	2.2
Safety hazard.....	2.3	5.1
No particular reason.....	3.9	2.2

## Attitude towards Permanent Installations

How many riders "would . . . like such programs to become a part of regular service?" Over three-quarters of the customers would favor such a move. Only 6.6% of all riders object:

[fols. 598-601] The 133 passengers who voiced positive objection about permanent installations were asked why not? Nuisance value came up as the largest group. "Don't like programs" was also an important individual item.

Reason	October	April
Total Objectors	133 = 100.0%	149 = 100.0%
Nuisance Value	48.9	51.7
Want to think, read, study, relax, sleep	11.3	22.2
Too much noise, confusion	11.3	18.1
Annoying, nerve-wracking, irritating	21.0	11.4
Like quiet	5.3	—
Versus Radio	33.1	30.2
Don't like programs	18.8	25.5
Dislike radio	7.5	4.7
Not properly adjusted	2.3	—
Equip some, not others	3.8	—
Silence sometimes	7	—
Interference with Service	5.3	5.4
Safety hazard	3.0	5.4
Distracts operators	2.3	—
Imposition on Public	9.0	4.7
Resent being forced to listen	3.0	2.7
Intrudes on privacy	—	2.0
Not proper place	5.3	—
Not necessary	7	—
Versus Transit Company	7	2.0
Will increase fares	—	2.0
Spend on better transportation	7	—
No particular reason	2.3	6.0
No answer	7	—

[fol. 602]

## EXHIBIT No. 9

STATION WWDC-FM, THURSDAY, OCTOBER 13, 1949

Page 1

7:00 8:00

Scheduled time	Actual time	
7:00	7:00	2 min newscast
7:10	7:10	time
7:15	7:14	2 min sportsca
7:20	7:19	temp
7:30	7:30	2 min newscast
7:35	7:35	time
7:45	7:44	2 min sportscast
7:50	7:48½	temp
7:55	7:56	time

Washington  
Hub Furniture Co.  
F.M. Program Anne.  
Sombrero Room  
Miller Furs  
F.M. Program Anne.  
Phillips Real Estate

8:00 9:00

8:00	7:59	2 min newscast	Sombrero Room
8:05	8:03½	time	Phillips Real Estate
8:10	8:11½	temp	Saks Furrier
8:20	8:20	2 min newscast	Arthur Murray Studio
8:25	8:25½	time	F.M. Program Anne.
8:30	8:31½	temp	Haber & Co.
8:35	8:37	time	Saks Furrier
8:40	8:40½	2 min newscast	Berlitz School
8:45	8:45	time	Mortons
8:50	8:50½	time	Hub Furniture Co.
8:55	8:55½	time	Wakefield Grille

## STATION WWDC-FM, THURSDAY, OCTOBER 13, 1949

9:00 10:00

Scheduled time Actual time

9:00	8:59	2 min newscast	
9:05	9:05½	time	F.M. Program Anne.
9:10	9:08½	temp	Electrical Institute
9:15	9:14½	time	Haber & Co.
9:20	9:20	2 min newscast	Phillips Real Estate
9:25	9:25	time	Capital Sewing Machine
9:30	9:30½	time	Hub Furniture Co.
9:35	9:34	time	Cancer Society
9:40	9:40	2 min newscast	
9:45	9:45	time	Miller Furs
9:50	9:49	temp	Washington
9:55	9:53½	time	F.M. Program Anne.

10:00 11:00

10:00	9:59	2 min newscast	
10:10	10:12	time	Hub Furniture Co.
10:15	10:16	2 min newscast	Berlitz School
10:20	10:21	time	F.M. Program Anne.
10:25	10:24	time	Hub Furniture Co.
10:30	10:32	temp	Electrical Institute
10:35	10:36	time	Haber & Co.
10:45	10:45½	2 min newscast	Arthur Murray Studio
10:50	10:50½	time	F.M. Program Anne.
10:55	10:53½	time	Counes Restaurant

11:00 12:00

11:00	10:59	temp	Hub Furniture Co.
11:05	11:05½	time	Electrical Institute
11:10	11:09½	time	Counes Restaurant
11:15	11:15½	2 min newscast	Sombrero Room
11:25	11:24	temp	Mayfair Cafe
11:30	11:30½	temp	Castleberg's
11:40	11:40	time	Capital Sewing Machine
11:45	11:44½	2 min newscast	Arthur Murray Studio

[fol. 603]

Page 2

11:50	11:49	time	Berlitz School
11:55	11:57	time	F.M. Program Anne.

12:00 1:00

12:00	12:01	temp	Electrical Institute
12:05	12:04½	time	Hub Furniture Co.
12:10	12:11	time	Miller Furs
12:15	12:14½	2 min newscast	
12:20	12:20½	time	Irvin's Restaurant
12:25	12:24	time	F.M. Program Anne.
12:30	12:28	temp	Castleberg's
12:40	12:41	time	Phillips Real Estate
12:45	12:44½	2 min newscast	Miller Furs
12:50	12:51	time	
12:55	12:54½	time	Castleberg's

1:00 2:00

1:00	12:58½	time	Bond Bread
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## STATION WWDC-FM, THURSDAY, OCTOBER 13, 1949

Scheduled time    Actual time

1:05	1:07	time	F.M. Program Anne.
1:10	1:10½	time	Phillips Real Estate
1:15	1:14½	2 min newscast	Sombrero Room
1:20	1:19	time	Electrical Center
1:25	1:26	time	Merchandising
1:30	1:30	temp	Hub Furniture Co.
1:35	1:34½	time	F.M. Program Anne.
1:40	1:40½	time	Washington
1:45	1:44	2 min newscast	Bond Bread
1:55	1:55	time	Rainbow Cleaning

2:00    3:00

2:00	1:59	temp	Bond Bread
2:05	2:03	time	F.M. Program Anne.
2:10	2:08½	time	Safety Anne.
2:15	2:15½	2 min newscast	
2:20	2:20	time	Bond Bread
2:25	2:23½	time	Haber & Co.
2:30	2:30½	temp	Miller Furs
2:35	2:34	time	U. S. Employment
2:40	2:38½	time	F.M. Program Anne.
2:45	2:42½	2 min newscast	
2:50	2:50	time	Bond Bread
2:55	2:54	time	Electrical Institute

3:00    4:00

3:00	3:00	temp	Berlitz School
3:05	3:06	time	Merchandising
3:10	3:09½	time	F.M. Program Anne.
3:15	3:15	2 min newscast	
3:20	3:22½	time	Bond Bread
3:25	3:26	time	Rainbow Cleaning
3:30	3:29½	temp	Miller Furs
3:35	3:36	time	Berlitz School
3:45	3:46	2 min newscast	Arthur Murray Studio
3:50	3:51	time	Safety Anne.
3:55	3:55	time	F.M. Program Anne.

4:00    5:00

4:00	4:00½	temp	Hub Furniture Co.
4:05	4:04	time	Irvin's Restaurant
4:10	4:09	time	Bond Bread

[fols. 604-608]

Page 3

4:15	4:15	2 min newscast	Sombrero Room
4:20	4:20½	time	Merchandising
4:25	4:26	time	F.M. Program Anne.
4:30	4:29½	temp	Morton's
4:35	4:34	time	Safety
4:40	4:42	time	Cancer Society
4:45	4:45½	2 min newscast	Arthur Murray Studio
4:50	4:50	time	Capital Sewing Machine



## STATION WWDC-FM, THURSDAY OCTOBER 13, 1949

5:00 6:00

Scheduled time	Actual time		
5:00	4:58½	2 min newscast	
5:05	5:05½	time	Care Anne
5:10	5:09½	time	F.M. Program Anne
5:15	5:15½	time	Truade
5:20	5:18½	2 min newscast	Berlitz School
5:25	5:26	time	Irvin's Restaurant
5:30	5:30	temp	F.M. Program Anne
5:35	5:36½	time	Electrical Institute
5:40	5:39½	2 min newscast	Arthur Murray Studio
5:45	5:45	time	Irvin's Restaurant
5:50	5:50	temp	Cancer
5:55	5:55½	time	Buckingham Market

6:00 7:00

6:00	5:59½	2 min newscast	
6:05	6:03	time	Merchandising
6:10	6:08½	temp	Buckingham Market
6:15	6:12½	time	F.M. Program Anne
6:20	6:19	2 min newscast	
6:25	6:24	time	Berlitz School
6:30	6:28½	temp	Capital Sewing Machine
6:35	6:35	time	Fat Boy Restaurant
6:40	6:39½	2 min newscast	
6:45	6:44	time	Bond Bread
6:50	6:47½	time	Truade
6:55	6:55	temp	F.M. Program Anne
7:00	6:59	sign off	

[fol. 609]

EXHIBIT No. 10

WWDC-FM

## Standard Opening Announcement

Good Morning . . .

This is WWDC-FM, Washington, operating at 101.1 on your F. M. Dial.

First, the 7:00 AM headline news.

(Give Brief News Headlines)

[fol. 610]

BERLITZ SCHOOL TRANSIT RADIO

Doctor, Lawyer, Merchant, Chief . . . everybody studies language at Berlitz . . . What about you? You need a language to keep up with the Joneses and with your business. Gain the asset that makes you outstanding as an individual. Learn a language at Berlitz. Take ad-

vantage of living in a Berlitz City. Berlitz will teach you. Call Sterling 0010 today . . . ask for the blue book . . . at Sterling 0010.

Note: precede newscasts with the following:

The Berlitz School of Languages, the largest language school in the world, in Washington at 839 17th Street, Northwest, brings you the latest news . . .

[fol. 61] Once upon a time when you were very small, you learned a language so easily, so quickly and so painlessly, that you never even knew it was happening. Today by the same technique, Berlitz can teach you any language of your choice. Call Sterling 0010 and get the details of the Berlitz Easy Method of Language study. Ask for the blue booklet at Sterling 0010.

Note: Newscasts will be preceded by the following:

The Berlitz School of Language, the largest language school in the world, in Washington at 839 17th Street, N. W., brings you the latest news:

[fol. 612] BERLITZ SCHOOL WWDC-FM

Today is the day . . . Are you registered at Berlitz for French, Spanish, Russian, German? If not, go right now to take your place for this Winter Session. You need at least one extra language to meet your social and business associates on an equal footing. Do it now . . . Your Berlitz School is at 839-17th Street, Northwest.

Note: Newscasts will be preceded by the following:

The Berlitz School of Languages, largest language school in the world, in Washington at 839 17th St. Northwest, brings you the latest news:

[fol. 613] BOND BREAD TRANSIT RADIO

Two kinds of Homogenized Bond Bread in One loaf . . . the delicious Bond Bread Half-and-Half loaf: Half a loaf of white bread . . . half a loaf of wheat bread! Here's economy for small families . . . variety for All families! Get the cellophane-wrapped Bond Bread Half-and-Half loaf today!

## [fol. 614] BUCKINGHAM SUPER MARKET TRANSIT RADIO

It's turkeys again at Buckingham Super Market. They're fresh killed, cleaned and drawn, all ready to be put in the oven . . . Only 69 cents a pound. To complete this tantalizing entree, don't forget those perfect U. S. No. 1 potatoes . . . a ten-pound bag for only 31 cents. The Buckingham Super Market, at 2920 Nichols Avenue, Southeast.

## [fol. 615] AMERICAN CANCER SOCIETY TRANSIT RADIO

Join the Field Army volunteers for the American Cancer Society in the District today. Learn to battle cancer with information at the Field Army Headquarters in the Chastleton Hotel, 16th & R Streets, N. W. Call EXecutive 3692 for information about training courses. This is not an appeal for money. Help tell the Cancer Story. Both men and women are needed to save lives from Cancer through knowledge about the disease in the Field Army of volunteers. Join today and save lives from Cancer.

## [fol. 616] CAPITAL SEWING MACHINE CO. TRANSIT RADIO

The sensational new Necchi \* Sewing Machine performs 21 operations usually done by hand without the aid of a single attachment. You've seen it advertised in Good Housekeeping . . . now see it demonstrated at Capital Sewing Machine Company. Prices on electric sewing machines start as low as \$35.00 . . . with low down payments, easy terms . . . at Capital Sewing Machine Company, 804 F Street, Northwest.

[fol. 617] Thirty-nine fifty buys a rebuilt Singer Electric Portable Sewing Machine at the Capital Sewing Machine Company . . . 804 F Street, Northwest. Capital has a complete line of fine sewing machines on long easy terms. Stop in for a demonstration or arrange for a home demonstration. See the marvelous new Necchi sewing machine demonstrated at the Capital Sewing Machine Company, 804 F Street, Northwest.

(Note: Necchi pronounced Neck-ee)

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\* Pronounce Necchi—"Neck-ee".



[fol. 618]

**CARE TRANSIT RADIO**

How would You like to be a Man Without A Country? In Europe today there are millions and millions of men, women and children without a country, without adequate food, clothing or shelter. You can help a refugee cling to life with a CARE food parcel . . . twenty-two pounds of highly nutritious food for only ten dollars. Send an order Today to CARE, Dupont Circle Building, Washington.

[fol. 619]

**CASTELBERG JEWELERS TRANSIT RADIO**

It's easy . . . and economical . . . to do your Christmas shopping early . . . when you take advantage of Castalberg Jeweler's transit specials. Today, Castalberg's offers all transit and FM listeners . . . a beautiful 12 piece coaster set . . . perfect for gift-giving or the home . . . for just 69 cents. Visit Castalberg's and see all the other wonderful gift suggestions. Castalberg's, America's Oldest Credit Jewelers, 1004 F Street, Northwest.

[fol. 620]

**COUNE'S RESTAURANT TRANSIT RADIO**

Know the formula for a restaurant's success? It's simple . . . offer courteous service; fine food, and favorite beverages. That's the formula that makes Coune's Restaurant, at 637 F Street, N. W., so popular with folks. So while you're downtown, stop at Coune's and enjoy fine food, tastefully prepared. Coune's Restaurant, 637 F Street, N. W., across from The Hecht Company.

[fol. 621]

**DOUGLAS PHOTOGRAPHERS TRANSIT RADIO**

A thing of beauty is a joy forever. A photograph by Douglas is something you, your family or friends will treasure for years. Douglas will take a studio portrait in your home, and deliver the finished portrait within 24 hours after selection. Phone GLebe 3949. No deposit required. Call Douglas Photographers, GLebe 3949.



## [fol. 622] ELECTRIC INSTITUTE TRANSIT RADIO

No. 1. For the best show in town don't miss the Electric Playhouse Friday at 2:30. Admission is free . . . no tickets needed for this hour of fascination. A play, newsreels, a fantasy of light and color . . . hundreds of ideas to make your home more beautiful, your life more gracious. Bring a friend and come Friday to the Electric Playhouse in the Pepco Building, 10th and E Northwest.

No. 2. It's a sparkling program that you should see . . . and it's free! New ways to use lighting to decorate your home, your dream kitchen with the latest electrical conveniences in operation. You'll enjoy a play, a newsreel of famous personages of the 1890's, and you'll thrill to beautiful illusions of light. It's Friday at 2:30 at the Electric Playhouse in the Pepco Building, 10th and E, Northwest. Remember the free show . . . no tickets needed . . . Friday at the Electric Playhouse. Bring your friends.

## [fol. 623] FAT BOY RESTAURANT TRANSIT RADIO

Folks all over town are hurrying to the gay, modern, Fat Boy Restaurant, 2201 New York Avenue, Northeast . . . for the best in dining and dancing pleasure. For dancing, it's the popular Art Clevas. For dining, it's delicious "T" bone steak . . . at \$2.00, and delectable chicken. That's the Fat Boy Restaurant, 2201 New York Avenue, Northeast . . . For reservations, call Trinidad 9324.

## [fol. 624] F. M. PROGRAM ANNOUNCEMENT (A) TRANSIT RADIO (alternate with B)

This program is being heard by home listeners, and in radio equipped buses and street cars, without cost to the Capital Transit Company or you. Actually, advertising revenues from these programs help to pay the cost of your transit ride. This is important to you in the face of higher transit operating costs.

[fol. 625] F. M. PROGRAM ANNOUNCEMENT (B) TRANSIT  
RADIO

(alternate with A)

These programs are being heard by our F. M. listeners at home, as well as those of you riding on Capital Transit radio-equipped street cars and buses. The receivers and speakers aboard these vehicles have been installed by Station WWDC—FM, which broadcasts these programs without cost to the Capital Transit Company.

[fol. 626] HABER & COMPANY, TRANSIT RADIO

Here's the buy of the town, ladies . . . 100% wool Zip Coats . . . at Haber & Co., 1205 G Street, N.W. only \$38.00 . . . These were up to \$59.95 so it's a wonderful sizable saving . . . Stop in today . . . See these specially priced Zip Coats, with warm full zip-in linings . . . some are even fur lined. Only \$38.00 at Haber & Co., 1205 G Street, N.W. Charge it . . . or use layaway or budget plan.

[fol. 627] HUB FURNITURE COMPANY, TRANSIT RADIO

Storewide values, tremendous savings in every department, that's the order of the day at the Hub Furniture Company, Washington's value and credit center, 7th and D Sts., N.W. This is the Hub's 47th anniversary and one of their specials is a big, family-size electric washer with balloon wringer for only \$59.47. Low or no down-payment and easy credit terms are always available at the Hub, 7th and D Sts., N.W.

[fol. 628] IRVIN'S RESTAURANT, TRANSIT RADIO

Say, how about having fried chicken, tonight . . . chicken-in-the-rough . . . at Irvin's Restaurant, 711—13th Street, Northwest. Tonight's special . . . a big platter of crisp, tender chicken, heaps of shoe string potatoes and tangy cole slaw . . . plus soup, rolls and butter . . . Irvin's famous rum pie And coffee . . . all for \$1.50. Other tempting dinners for as little as 80 cents . . . at Irvin's Restaurant, 711—13th Street, Northwest.

## [fol. 629] MAYFAIR, TRANSIT RADIO, TF

It's not far to enjoyment when you stop at the Mayfair. Just below F Street at 527 13th, the Mayfair serves delicious, well-planned luncheons to please *every appetite*. You'll like the Mayfair's quiet comfort and excellent service. For luncheon, or party reservations, call Metropolitan 9326. Never a cover, minimum or tax at the Mayfair, open 11 to 1 daily . . . Saturdays until midnight, at 527 13th Street, N.W.

[fol. 630] People come from far and near . . . to wine and dine and have fun there. Where? The Mayfair? It's a wonderful place, downtown at 527—13th Street . . . The atmosphere is perfect for relaxing, talking or enjoying delicious food. Music by the Sammy Seymour trio . . . Never a cover, minimum or tax . . . at the Mayfair, 527—13th Street, open daily from 11 to 1 . . . Saturday until midnight.

## [fol. 631] MERCHANDISING COPY, TRANSIT RADIO

If you live in Mt. Pleasant . . . you'll find it convenient to buy everything on your grocery list . . . at the Pleasantway self-service Market . . . 3127 Mt. Pleasant Street, N.W. Or if you shop in Lincoln Park . . . you'll find select fruits and vegetables at Hardesty's Service Market . . . 1504 East Capitol St.

[fol. 632] There's a D.G.S. store near you! Columbia Heights shoppers will find the service is the finest and the quality is the best at . . . The Gordon D.G.S. Market . . . 2740—14th Street, N.W. Or if you shop in Friendship Heights . . . you'll find it convenient to buy your grocery needs at The Jenifer Market . . . Wisconsin Avenue and Jenifer Streets, N.W.

## [fol. 633] MERCHANDISING COPY, LARIMER'S SUPER MARKET &amp; TERMINAL MARKET, TRANSIT RADIO

—Here's a suggestion for you Dupont Circle Shoppers! You'll find the best in fruits and vegetables at Larimer's Super Market . . . 1727 Connecticut Avenue, Northwest. Or if you shop in Shepherd Park, you'll find it convenient to shop at the Terminal Market . . . 7833 Eastern Ave.



nue, N.W. Remember, if you hear it on the car or bus, you can buy with confidence.

[fol. 634]      MILLERS FURS, TRANSIT RADIO

Ladies! Now, have your old fur coat remodeled into a new, luxuriant fur fashion. It can be done in a much shorter time . . . with excellent workmanship guaranteed . . . at a truly moderate cost . . . at Millers newer, greater fur store, 1231 G Street, Northwest. Bring your coat in . . . discuss with Mr. Miller or any of his dependable furriers, the new fashion for your coat. That's Millers New Fur Store—1231 G Street, N.W. Go in there today.

[fol. 635]      MORTON'S, TRANSIT RADIO

Mothers . . . Every Day is Sale Day in Morton's Babyland. Large, 27 by 27 inch Birdseye Diapers are Only \$1.59 every day in the week! And, famous Birdseye Diapers for as little as \$1.59 is typical of the great cash-and-carry savings you'll find on All cold weather clothes in Morton's Babyland. At Morton's . . . just above Pennsylvania Avenue, on Seventh Street, Northwest.

[fol. 636]      ARTHUR MURRAY, TRANSIT RADIO

Open:

The Arthur Murray Dance Studios . . . 1106 Connecticut Avenue . . . can show you the way to more fun . . . more popularity. But first, the news.

Close:

It's a wonderful feeling to know you can hold your own on a dance floor with any partner . . . any music. That self-confidence is yours for life . . . when you enjoy Arthur Murray's individualized instruction. If you want to brush up on the newest steps . . . specialize in your favorite dance . . . or if you've never danced before . . . there's an Arthur Murray course designed just for you. For a free trial lesson, visit the Arthur Murray Dance Studios . . . 1106 Connecticut Avenue. Open daily from 10 AM to 10 PM. Telephone Executive 4100.



[fol. 637] Open:

The Arthur Murray Dance Studios . . . 1106 Connecticut Avenue . . . can show you the way to more fun . . . more popularity. But first, the news.

Close:

Mother, does your daughter enjoy a whirl of popularity? If she spends most evenings at home . . . or watching *other* people dance . . . let Arthur Murray come to the rescue. As she becomes a good dancer, she'll develop poise and self-confidence . . . make friends . . . have a wonderful time. Give her the very best individualized instruction at the Arthur Murray Dance Studios . . . open daily from 10 AM to 10 PM. 1106 Connecticut Avenue . . . Executive 4100.

[fol. 638] (Opening)

The Arthur Murray Dance Studios . . . 1106 Connecticut Avenue . . . can show *you* the way to more fun . . . more popularity! But first, the news.

(Closing)

It's not enough to *work well* . . . you need fun and relaxation too! After a hard day's work, dancing at Arthur Murray's is a real pick-up . . . one of the most healthful diversions you can enjoy. An Arthur Murray course brings your dancing up to date . . . gives you a new self-assurance and vibrant, released personality. Learn to relax . . . and Like it! For a free trial lesson, visit the Arthur Murray Dance Studios . . . 1106 Connecticut Avenue. Open daily from 10 AM to 10 PM. Telephone Executive 4100.

[fol. 639] PHILLIPS AND COMPANY, TRANSIT RADIO, TF

Phillips and Company, 1713 K Street, Northwest, presents in Chevy Chase a lovely detached all brick, slate roof home. Three beautiful bedrooms and two baths, full finished attic, large living room, full den and modern kitchen. Full basement, one-car garage on a large lot convenient to stores and schools. See them today for this bargain and unusual

financing. That's at Phillips and Company, Sterling 3323, remember Sterling 3323.

[fol. 640] Mr. and Mrs. Homeowner . . . would you like to sell your real estate for a top market price? Phillips and Company at 1713 K Street, N. W., have clients waiting for your property. Phone Sterling 3323 . . . Phillips and Company will have one of their friendly representatives call on you. Sterling 3323.

[fol. 641] October 11, 1949 TF

Phillips and Company . . . Real Estate, at 1713 K Street, Northwest offers a new, masonry constructed home . . . with two large bedrooms, a spacious living room, lovely dining room, modern kitchen, and full basement . . . plus air conditioned heat and a large lot for only \$10,500. It's in Chesterbrook . . . and it's a real buy. For an appointment, call Sterling 3323 . . . Phillips and Company, Sterling 3323.

[fol. 642] RAINBOW DYEING AND CLEANING, TRANSIT RADIO

Stay as sensible as you are, housewives! The Rainbow Dyeing and Cleaning Company are experts in dyeing your draperies, slip covers and All Household accessories . . . any color of the rainbow! This means *new*, glowing fall beauty for your home at comparatively *little* expense. Dyeing or cleaning, call Rainbow—Atlantic 6400 . . . Free pick-up and delivery . . . that's Atlantic 6400.

[fol. 643] Attention, Housewives! It's fall cleaning time! Send your draperies, slip covers and All accessories to the Rainbow Dyeing and Cleaning Company . . . their colors will come back fresh and glowing. Call Atlantic 6400 . . . say you heard this announcement and get a *10% discount!* That's Rainbow Dyeing and Cleaning . . . Atlantic 6400 . . . Free pick-up and delivery!

[fol. 644] SAFETY, TRANSIT RADIO

You, too, can help make Washington a safer place to live and work. Be careful crossing streets. Watch the traffic lights. Cross *only* when the signal is green. The Traffic lights are for your protection. Heed them and avoid danger.

## [fol. 645] SAFETY No. 3, TRANSIT RADIO

When you alight from a street car or bus, walk to the corner before crossing the street. Avoid Accidents by being alert to danger. Help make Washington a safer place to live and work by being careful . . . today and everyday.

## [fol. 646] SAFETY No. 1, TRANSIT RADIO

*Stop and look!* When you cross the street, cross only at crosswalks. Look in both directions. Cross only when the light is green, or when the signal says Walk. You can help make Washington the safest city in the nation by Always being on the alert.

## [fol. 647] MERCHANDISING COPY, TRANSIT RADIO

Are you a Chevy Chase Shopper? Then decide to get the highest quality meats and vegetables. Always shop at the Chevy Chase Supply Company's big super market at 5630 Connecticut Avenue, N. W. Or, if you live in Trinidad, you'll find a complete selection of everything for your table at Dave's Super Market, 1725 Montello Avenue, N. E.

## [fol. 648] SAKS FURS, TRANSIT RADIO, OCTOBER 13, 1949

Ladies . . . take your choice of Mouton . . . Muskrat . . . or Mink . . . but *make* your choice at Saks, for the *lowest* fur prices imaginable! Mouton-dyed lamb . . . your warm, versatile coat, for only, \$95 plus tax! Prime Northern-Back Muskrat . . . just \$235, plus tax! And silky, luxurious dyed China Mink . . . unequalled at \$345, plus tax! All Three at Saks . . . furriers of distinction since 1888 . . . at 610 12th Street, N. W.

## [fol. 649] BURLINGTON HOTEL (SOMBRERO ROOM), TRANSIT RADIO

The famous Sombrero Room in the Burlington Hotel, 1120 Vermont Avenue, Northwest, features two grand dinner specials every night—one, a thick juicy tenderloin steak for only a dollar seventy-five . . . the other, delicious tender roast prime ribs of beef for a dollar and a half. Try

these delightful dinner specials with your favorite drinks at the famous Sombrero Room, right downtown.

Note: When sponsoring news, add: "Here is the latest news, brought to you by the famous Sombrero Room—"

[fol. 650]      TRU-ADE, TRANSIT RADIO

The best refresher Ever Bottled! That's what Washington says about Tru-Ade . . . the beverage with Triple Taste Appeal! *Taste* Tru-Ade's delicious *real fruit flavor!* Trust Tru-Ade's pasteurized purity . . . lasting vacuum sealed freshness! Enjoy Tru-Ade's natural goodness, unspoiled by carbonation or artificial preservatives. The best refresher Ever Bottled . . . that's Tru-Ade! Get Tru-Ade in bottle, carton, or case Today!

[fol. 651] The perfect refreshment everytime you're thirsty . . . *different, delicious* Tru-Ade! Tru-Ade's a new kind of bottled beverage . . . all rich *real-fruit* flavor with a natural sparkle that's no kin to carbonation, or artificial preservatives. Tru-Ade's appeal is *lasting* . . . its goodness is pasteurized and vacuum-sealed to stay wholesome and fresh to the last tangy sip. Try Tru-Ade in bottle or carton today.

[fol. 652]      U. S. EMPLOYMENT SERVICE, TRANSIT RADIO

The United States Employment Service reminds employers that your best bet . . . is to hire a vet. Call the United States Employment Service for careful selection of Veterans for any type of job. There are thousands to choose from according to *your* specifications. Telephone District 7000.

[fol. 653]      WAKEFIELD GRILL, TRANSIT RADIO

There's no doubt about it . . . the Wakefield Grill, 920 F Street, Northwest, is rapidly gaining a reputation for serving the best old-fashioned lunches in town . . . at down-to-earth-prices. Today, Wakefield is offering an electronically cooked Cheeseburger luncheon platter for a mere 50 cents, including crisp french fries, cole slaw, coffee or tea. Today, at Wakefield Grill, cheeseburger luncheon : . . 50 cents . . . 920 F Street, Northwest.



## [fol. 654] OUR WASHINGTON #6 TRANSIT RADIO, F. B. I. #1

Are you the proud parent of a junior G-Man? Give him the thrill of his life by taking him on a F.B.I. G-Man tour. Each weekday, Monday thru Friday, from 9:30 to 4:00 PM., the Department of Justice shows its visitors just how the F.B.I. does its job . . . they explain their finger print system, tour the crime detection laboratories, and visit the fire arm laboratory, where a special agent gives a lively exhibition of G-Man guns in action. For information on how to reach the Department of Justice . . . call Michigan 6363.

## [fol. 655] OUR WASHINGTON ZOO #2 TRANSIT RADIO

Do you know what a Pigmy Marmoset is? It's a monkey . . . the tiniest kind of monkey in the whole world. They're usually found in South America . . . but we have two of them right here in Washington at our National Zoological Park. You can see these amusing Pigmy Marmosetts and thousands of other rare animals, birds and reptiles, today and everyday between 9 and 5 . . . at the Zoo. For information on how to get there . . . call the Capital Transit Company at Michigan 6363.

Marmoset is pronounced "Mar-mo-Zet."

## [fol. 656] OUR WASHINGTON, TRANSIT RADIO

Are you visiting Washington? The Washington Board of Trade's Greater National Capital Committee suggests you visit the Library of Congress. Located directly across from the Capitol Building, the library, which is the largest in the world, contains the original copies of the Declaration of Independence and our Constitution . . . plus other interesting exhibits. For information on how to reach the Library of Congress . . . call Capital Transit . . . at Michigan 6363.

## [fol. 657] SIGN-OFF, TRANSIT RADIO

Each weekday, starting at seven A.M., we bring you a program of transcribed music, with latest news headlines, temperature and weather reports, and information of timely interest. These programs are heard by our F M listeners

at home, as well as those of you riding on Capital Transit radio-equipped buses and streetcars. The receivers and speakers aboard the buses and streetcars have been installed by WWDC-FM, which broadcasts these programs without cost to the Capital Transit Company. This concludes our separate F M programming for today . . . The time is seven P.M. This is WWDC—FM, Washington. (Pause) For the continuation of our schedule, we now join the regularly scheduled programs of WWDC.

[fols. 658-662] BEFORE PUBLIC UTILITIES COMMISSION OF THE  
DISTRICT OF COLUMBIA

P. U. C. No. 3490/1

Formal Case No. 390

In the Matter of Radio Reception in Busses and Street Cars  
of CAPITAL TRANSIT COMPANY

Application of

FRANKLIN S. POLLAK, Intervener

and

GUY MARTIN, Intervener

For Reconsideration and Other Relief

Attorneys: Franklin S. Pollak, for Himself; Guy  
Martin, for Himself.

[fol. 663] On December 19, 1949 this Commission issued its Order No. 3612 dismissing the investigation previously ordered by it in this matter.

In accordance with Paragraph 64 of Section 8 of the Act of March 4, 1913, as amended, and Chapter 14 of the Commission's Rules of Practice and Procedure, we hereby apply for reconsideration of the matters involved in the Commission's order of dismissal.

Specifically, and in addition, we ask for the following relief, as set forth hereinafter in more detail.

We ask the Commission, on notice to Capital Transit Company and Washington Transit Radio, Inc. ("respondents"), to amend its Order of Investigation herein, Order No. 3560, so as to refer therein specifically to all the statutory powers of this Commission applicable to a determination of whether the broadcasts here in question should be approved, and so as to state that the investigation, under those powers, is for the purpose of determining whether the broadcasts should be approved. After such amendment and [fols. 664-717] due notice thereof, we ask the Commission to make the findings of fact proposed in our brief dated and filed November 23, 1949, and to prohibit the reception of these broadcasts. In requesting that the Order of Investigation be so amended we do not concede that the Commission lacks power to prohibit the reception of these broadcasts under the existing Order of Investigation.

[fol. 718] UNITED STATES DISTRICT COURT FOR THE DISTRICT  
OF COLUMBIA

Public Utilities Commission of the District of Columbia,  
Washington 4, D. C.

Civil Action No. 1655-50 May 1, 1950.

FRANKLIN S. POLLAK, 1333—27th Street, N. W., Washington  
7, D. C., and Guy Martin, 3117 Woodley Road, N. W.,  
Washington 8, D. C., Petitioners,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA,  
and James H. Flanagan, Gordon R. Young, and Kenneth  
W. Spencer, Constituting the Public Utilities Commission  
of the District of Columbia, Respondents

Civil Action No. 1694-50

TRANSIT RIDERS ASSOCIATION, Unincorporated, 2017 S Street,  
N. W., Washington, D. C., Consisting of Claude N. Palmer,  
President, 8010 Eastern Drive, Silver Spring, Maryland,  
Raymond A. Seelig, Vice-President, 3260—16th Street,  
N. W., Washington, D. C.; Otto G. Janssen, Secretary-  
Treasurer, 3830—39th Street, N. W., Washington, D. C.,  
and Others Too Numerous to List Individually, Petition-  
ers,

v.

[fol. 719] PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF  
COLUMBIA, Respondent

Civil Action No. 1716-50

PAUL NATHANIEL TEMPLE, Residence 901 Garland Avenue,  
Takoma Park, Maryland, Office 1625 K Street, N. W.,  
Washington, D. C., Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA,  
Respondent

CERTIFICATION OF RECORD ON APPEAL—Filed May 1, 1950

There is transmitted herewith the record in P. U. C. No.  
3490/1, Formal Case No. 390, before the Public Utilities  
Commission of the District of Columbia, "In the Matter of



Radio Reception in Busses and Street Cars of Capital Transit Company. The said record is transmitted in accordance with provisions of Paragraph 65 of the Act of March 4, 1913 (Sec. 43-705 D. C. Code), creating the Public Utilities Commission, as amended by the Act of August 27, 1935.

The record consists of the following:

1. Order No. 3560, dated July 14, 1949.
2. Letter of National Gateway Citizens' Association dated February 22, 1949.
3. Letter of Burleith Citizens Association dated April 18, 1949.
4. Notice of hearing.
5. Petition of Washington Transit Radio, Inc., for leave to intervene.
6. Letter of Mid-City Citizens Association, undated.
7. Letter of Stanton Park Citizens Association, dated October 3, 1949.
- [fol. 720] 8. Letter of Fort Davis Citizens' Association, dated October 5, 1949.
9. Resolution of Manor Park Citizens Association, dated October 6, 1949.
10. Letter of Shipley Terrace Citizens Association, dated October 4, 1949.
11. Letter of Kalorama Citizens Association, dated October 14, 1949.
12. Letter of District of Columbia Industrial Union Council, C. I. O., dated October 19, 1949.
13. Letter of Northeast Business Men's Association, Inc., dated October 20, 1949.
14. Petition of Robert W. Burton, on behalf of Burleith Citizens Association, October 21, 1949, for leave to intervene.
15. Petition of Franklin S. Pollak, October 21, 1949, for leave to intervene.
16. Petition of Guy Martin, October 21, 1949, for leave to intervene.
17. Letter of National Federation of Post Office Clerks, dated October 21, 1949.
18. Letter of Local No. 2, National Federation of Federal Employees, dated October 20, 1949.

19. Letter of National Association of Letter Carriers, dated October 21, 1949.

20. Letter of Trinidad Citizens Association, dated October 22, 1949.

21. Letter of Lincoln Park Citizens Association, dated October 21, 1949.

22. Letter of Crestwood Citizens Association, dated October 25, 1949.

23. Letter of Wendell Rynerson, dated October 29, 1949.

24. Four petitions.

25. Letter of Brightwood Citizens Association, dated October 21, 1949.

[fol. 721] 26. Letter of The Georgetown Citizens Association, dated October 25, 1949.

27. Letter of MacArthur Boulevard Citizens Association, dated October 26, 1949.

28. Letter of The Dupont Circle Citizens Association, dated October 26, 1949.

29. Telegram of American Federation of Government Employees, dated October 26, 1949.

30. Letter of Recorded Music Society of Washington, D. C., dated October 27, 1949.

31. Telegram of 16th Street Highlands Citizens Association, dated October 27, 1949.

32. Letter of Ivy City Citizens Association, Inc., dated October 27, 1949.

33. Letter of Star-Times Publishing Co., St. Louis, Mo., through its Attorney William Thomson, files its appearance.

34. Petition of Paul N. Temple, Jr., for leave to intervene.

35. Letter of The Forest Estates Citizens' Association, dated November 1, 1949.

36. Letter of The Wheel of Progress, dated November 1, 1949.

37. Letter of the Federation of Citizens Associations, dated October 12, 1949.

38. Letter of Minnesota Center Citizens Association, dated November 4, 1949.

39. Telegram of Bernard Tassler for National Assembly for the Advancement of Public Relations; dated October 31, 1949.

40. Letter of Connecticut Avenue Citizens Association, dated November.

41. Motion of Awalt, Clark & Sparks to correct the record.

42. Motion of Franklin S. Pollak and Guy Martin to correct the record.

[fol. 722] 43. Letter of Progressive Citizens Association of Georgetown, dated November 22, 1949.

44. Copy of letter of Congress Heights Citizens Association, dated November 26, 1949.

45. Transcripts of hearing for October 27, 28, 31, and November 1, 1949.

46. Exhibits 1 through 13, with exception of No. 12 which was not admitted. (See pages 383 and 384 of Transcript).

47. Findings and Order No. 3612, dated December 19, 1949.

48. Applications of Franklin S. Pollak and Guy Martin, interveners, for reconsideration of Order No. 3612.

49. Petition of Hector G. Spaulding, et al., for reconsideration of Order No. 3612.

50. Application of Transit Riders' Association for reconsideration of Order No. 3612.

51. Petition of Paul N. Temple, Jr. for reconsideration of Order No. 3612.

52. Application of Bernard Tassler for National Citizens Committee Against Forced Reading and Forced Listening.

53. Letter of Paul Sifton, dated January 18, 1950.

54. Petition of Progressive Citizens Association of Georgetown for reconsideration of Order No. 3612.

55. Order No. 3631, dated February 15, 1950, denying petitions for reconsideration of Order No. 3612.

By direction of the Commission:

E. J. Milligan, Executive Secretary. (Seal.)

I, E. J. Milligan, Executive Secretary of the Public Utilities Commission, hereby certify that the documents designated hereinabove constitute the true and correct record and [fol. 723] transcript of proceedings before the said Commission in the above stated cause.



In testimony whereof, I hereunto subscribe my name and affix the Seal of the Public Utilities Commission this 1st day of May, 1950.

E. J. Milligan, Executive Secretary. (Seal.)

Enclósures.

[fol. 724] IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA

Civil Action No. 1655-50

FRANKLIN S. POLLAK, Petitioner, 1333 27th Street, N. W.,  
Washington 7, D. C., and Guy Martin, Petitioner, 3117  
Woodley Road, N. W., Washington 8, D. C.,

against

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA  
and James H. Flanagan, Gordon R. Young and Kenneth  
W. Spencer, Constituting the Public Utilities Commission  
of the District of Columbia, Respondents

DESIGNATION OF RECORD ON APPEAL—Filed July 26, 1950

The Clerk will please prepare the record on appeal herein and include the following:

1. Petition of appeal filed April 13, 1950.
2. Motion to dismiss filed by Capital Transit Company May 2, 1950.
3. Motion to dismiss filed by Washington Transit Radio, Inc., May 2, 1950.
4. Motion of the respondents to dismiss the petition of appeal, filed May 3, 1950.
5. Order granting motion of John O'Dea, People's Counsel, to intervene, filed May 10, 1950.
- [fols. 725-726] 6. Order granting intervention by Capital Transit Company, filed June 1, 1950.
7. Order granting intervention by Washintgon Transit Radio, Inc., filed June 2, 1950.
8. Order dismissing petition of appeal on motion of the respondents, filed June 15, 1950.



9. Order dismissing petition of appeal on motion of Capital Transit Company, filed June 15, 1950.

10. Order dismissing petition of appeal on motion of Washington Transit Radio, Inc., filed June 15, 1950.

11. The opinion of the Court dated June 1, 1950; filed July 5, 1950.

12. Notice of appeal filed July 14, 1950.

13. Statement of the points on which the appellants (petitioners) intend to rely.

14. This designation.

Paul M. Segal, Harry P. Warner, Quayle B. Smith,  
816 Connecticut Avenue, Washington 6, D. C.,  
Attorneys for the plaintiff.

July 26, 1950.

[fol. 727] IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA

[Title omitted]

RESPONDENTS'-INTERVENORS' COUNTER-DESIGNATION OF  
RECORD ON APPEAL—Filed August 4, 1950

The Public Utilities Commission of the District of Columbia, Capital Transit Company, and Washington Transit Radio, Inc., Appellees in the above-entitled cause, hereby designate the following parts of the record to be included in the transcript on appeal in addition to those designated by the Petitioners-Appellants; such additional parts being deemed necessary and material for a determination of the questions raised on appeal; namely, the following portions of the record of the proceedings before the Public Utilities Commission of the District of Columbia in its Formal Case No. 390, certified and filed with the Court, herein pursuant to the provisions of Section 43-705, D. C. Code, 1940, by the Secretary of the Commission under date of May 1, 1950:

I. (Item 1) Order No. 3560, dated July 14, 1949.

II. (Item 4) Notice of Hearing, dated September 19, 1949.

III. (Item 45) Portions of the testimony from the transcripts of hearing before the Commission on October 27, 28, 31, and November 1, 1949, as follows:

[fol. 728]

Witness	Beginning		Ending	
	Page	Line	Page	Line
Lorane T. Johnson.....	5	14	6	13
William H. Voltz.....	7	2	8	3
F. A. Sager.....	8	11	13	7
	16	4	16	13
E. C. Giddings.....	156	16	166	19
	168	18	169	9
	199	4	199	9
Hulbert Taft, Jr.....	200	2	206	7
R. L. Willoughby.....	215	9	221	2
E. L. Keller.....	223	2	227	22
I. S. Nichols.....	229	3	234	3
K. C. McClosky.....	234	13	241	23
Max F. Ryan.....	242	16	249	16
Andrew Sarkady.....	250	6	254	7
	261	18	263	8
	264	6	265	17
Edward G. Doody.....	268	20	292	7
	312	8	312	21
Donald O'Neill.....	315	20	326	23
Norman Reed.....	340	14	351	10
Ben Strouse.....	361	22	373	13
	385	1	385	19
	397	1	398	14
Frank F. McIntosh.....	399	9	411	10
Ross H. Beville.....	443	5	453	24

IV. (Item 46) Certain of the Exhibits before the Commission as follows:

Exhibit No. 1

Exhibit No. 2

Exhibit No. 3

Exhibit No. 4

Exhibit No. 5

Exhibit No. 8

Exhibit No. 9

Exhibit No. 10

[fol. 729] Exhibit No. 11

Exhibit No. 13

V. (Item 47) Findings and Order No. 3612, dated December 19, 1949.

VI. (Item 48) Applications of Franklin S. Pollak and Guy Martin for Reconsideration of Order No. 3612.

VII. (Item 50) Application of Transit Riders' Association for Reconsideration of Order No. 3612.

VIII. (Item 55) Order No. 363I, dated February 15, 1950.

IX. The Certificate of the Secretary of the Commission, dated May 1, 1950, accompanying the Commission's Record.

10. This Counter-Designation.

Dated at Washington, D. C. this 4th day of August, 1950.

Lloyd B. Harrison, District Building, Washington, D. C., Attorney for Public Utilities Commission of the District of Columbia. Edmund L. Jones, Colorado Building, Washington, D. C.; F. G. Awalt, Daryal A. Myse, 822 Connecticut Ave., N. W., Washington 6, D. C., Attorneys for Capital Transit Company. W. Theodore Pierson, 1007 Ring Building, Washington, D. C., Attorney for Washington Transit Radio, Inc.

[fols. 730-731] Certificate of Service (omitted in printing).

[fol. 732] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION TO TRANSMIT RECORD BEFORE PUBLIC UTILITIES COMMISSION TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT—Filed August 24, 1950

The plaintiffs move that the original record before the Public Utilities Commission on file in the District Court be transmitted to the United States Court of Appeals for the District of Columbia Circuit.

In support of this motion the plaintiffs allege and the parties stipulate:

1. Counsel for the respondents and the intervenors have designated for certification substantial portions of the record before the Public Utilities Commission.

[fols. 733-734] 2. The Clerk of the Court can expedite the transferral of the record in the District Court to the Court of Appeals by transmitting the entire record before the Pub-

lic Utilities Commission rather than by copying and extracting only the designated portions.

3. This motion is filed at the suggestion of and for the convenience of the Clerk of the Court!

4. Counsel for respondents and intervenors consent to the granting of this motion upon the basis of the stipulation herein.

5. It is stipulated that only those portions of the record before the Public Utilities Commission which have been designated by respondents and intervenors will be considered as certified to the United States Court of Appeals for the District of Columbia Circuit.

6. It is further stipulated that this motion and the order of the Court thereon shall be transmitted to the Court of Appeals as a part of the record.

Harry P. Warner, Quayle B. Smith, 816 Connecticut Avenue, Washington 6, D. C., Attorneys for the Plaintiffs.

August 24, 1950.

[fol. 735] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER—Filed August 24, 1950

Upon consideration of plaintiffs' motion requesting that the original record before the Public Utilities Commission be transmitted to the United States Court of Appeals for the District of Columbia Circuit; and upon consideration of the stipulation by the parties that only those portions of the record before the Public Utilities Commission which have been designated by respondents and intervenors will be considered as certified to the United States Court of Appeals for the District of Columbia Circuit; the motion is hereby granted this 24th day of August, 1950.

Burnita Shelton Matthews, Judge.



IN THE

AUG 3 1951

**Supreme Court of the United States**

OCTOBER TERM, 1951

No. 224 /

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA,  
CAPITAL TRANSIT COMPANY, AND WASHINGTON TRANSIT  
RADIO, INC., *Petitioners*,

v.

FRANKLIN S. POLLAK AND GUY MARTIN, *Respondents*.

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT.**

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SAMUEL O. CLARK, JR.,  
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*Attorneys for Petitioner,  
Capital Transit Company.*

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1007 Ring Building,  
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*Attorneys for Petitioner,  
Washington Transit  
Radio, Inc.*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1951

\_\_\_\_\_  
No.  
\_\_\_\_\_

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA,  
CAPITAL TRANSIT COMPANY, AND WASHINGTON TRANSIT  
RADIO, INC., *Petitioners,*

v.

FRANKLIN S. POLLAK AND GUY MARTIN, *Respondents.*

\_\_\_\_\_  
**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT.**

\_\_\_\_\_  
*To the Honorable, the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

The petitioners, the appellees below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on June 1, 1951 (R. 132).

**OPINIONS BELOW.**

The opinion and order of the Public Utilities Commission (R: 114-122) appealed by respondents to the United States District Court for the District of Columbia is unreported.



The opinion of the District Court (R. 2-3) dismissing the original petition of appeal is unreported. The opinion of the United States Court of Appeals for the District of Columbia reversing the District Court (R. 124-131) is reported in F. (2d)

### **JURISDICTION.**

The judgment of the United States Court of Appeals for the District of Columbia was entered on June 1, 1951 (R. 132), and a petition for a re-hearing was denied on July 6, 1951 (R. 167). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(2) and the District of Columbia Code, 1940, Title 43, Section 705.

### **QUESTIONS PRESENTED.**

(1) Whether the reception of radio programs on the vehicles of a private carrier, operating under governmental authority and subject to governmental regulation, is "governmental action" within the meaning of the Fifth Amendment to the Constitution.

(2) Whether a minority of passengers objecting to radio broadcasts on streetcars and buses are deprived of liberty without due process of law under the Fifth Amendment when, after hearing, the Public Utilities Commission upon an investigation initiated by it finds on the basis of substantial evidence of record that such radio reception tends to promote public convenience, comfort, and safety by improving conditions under which the public rides and then dismisses its own investigation on those subjects.

(3) Whether the Government is required by the Fifth Amendment to restrain communication with public conveyances if some passengers object or whether, instead, the liberties protected by the Fifth Amendment are relative and subject to the adjustment of competing private interests for the benefit of the general public by the legislative and

executive branches of the Government acting in accordance with established processes of law.

(4) Whether radio communication of news, weather reports, and other announcements that are important to the convenience and safety of the public are protected by the First Amendment to the Constitution only if commercial advertising messages are not included or whether such commercial messages are protected by the First Amendment when their elimination by Government would terminate the dissemination of constitutionally protected information to the public.

(5) Whether the public has a constitutional right to utilize the services of a private common carrier or whether such rights as they may have exist only by virtue of existing statutes.

(6) Whether the Commission erred as a matter of law: (a) in failing to find that radio reception on Capital Transit vehicles constituted unreasonable service; (b) in finding such reception not inconsistent with public convenience; and (c) in failing to stop such reception.

(7) Whether any private rights of respondents were invaded by the Commission's order dismissing its own investigation limited to questions of public convenience, comfort, and safety.

(8) Whether the court may consider and weigh matters outside the record before the Commission and the court, find ultimate facts different than the Commission found, reach contrary conclusions, and then require the Commission to proceed in accordance therewith.

### **STATUTES INVOLVED.**

The pertinent constitutional and statutory provisions are printed in the Appendix, *infra*.

## STATEMENTS OF FACTS.

In 1948 Capital Transit and Washington Transit Radio, Inc. (Transit Radio), entered into a contract under which Transit Radio installed and maintained radio receiving equipment in a substantial number of Capital Transit vehicles without cost to the latter (R. 34, 102-110).

The radio programs received on the vehicles consist primarily of music interspersed with news, weather reports, other announcements important to the convenience and safety of the public, and commercial announcements (R. 38, 75, 86).<sup>1</sup> The radio signal is regularly checked and kept at a low level for comfortable listening (R. 96-100). Both subjective and objective tests show that the radio signals do not hinder or prevent normal communication (R. 31-33, 76), and it is not possible to measure acoustically any difference in sound level contributed by the radio reception (R. 91-93, 96, 101, 113).

After a number of months of operation of transit radio, the Commission in 1949, after notice of investigation pursuant to Section 43-415 and 43-416, D. C. Code, 1940, held a public hearing on the questions of public convenience, comfort, and safety presented by such notice (R. 28, 29).<sup>2</sup> The Commission proceeding was not initiated on the complaint of respondents, but they were allowed to intervene in the investigatory proceeding. After the hearing the Commission issued its opinion and Order No. 3612 dismiss-

<sup>1</sup> "Commercials" are limited to 60 seconds duration each, not to exceed six minutes in each hour (R. 106).

<sup>2</sup> A large part of the Commission's record of the Proceedings before it was not certified to the Court of Appeals as a part of the record. Respondents did not designate any part of the Commission record as part of the record so certified. Petitioners designated the Commission's order and such parts of the Commission's record as they deemed necessary for consideration of the questions raised on appeal by Respondents. By stipulation of the parties and by order of the District Court, only such parts of the Commission's record as had been designated were certified to the Court of Appeals as the record.

ing its investigation. The bases for its order were its findings and conclusions that (a) radio reception on transit vehicles is "not an obstacle to safety of operation"; (b) "public comfort and convenience is not impaired . . . and [radio reception] tends to improve the conditions under which the public rides"; and (c) the installation and use of radios on transit vehicles "is not inconsistent with public convenience, comfort and safety" (R. 120). No question has been raised by Respondents as to the substantiality of the evidence in support of the Commission's findings.

Respondents are part of a small minority who object to such radio program reception.<sup>3</sup> They appealed to the District Court, pursuant to Section 43-705, D. C. Code, 1940, to review the Commission's order dismissing its own investigation. The District Court dismissed their appeal after concluding that "there is no legal right of the petitioners [respondents] . . . which has been invaded, threatened or violated by the action of the Public Utilities Commission . . ." (R. 3). The Court of Appeals reversed the District Court with instructions to vacate the Commission's order and remand the case to the Commission for further proceedings in conformity with its opinion.

### **SPECIFICATION OF ERRORS TO BE URGED.**

The Circuit Court of Appeals erred:

(1) In holding that the actions of a privately owned common carrier, operating under governmental authority and subject to governmental regulations, is "governmental

<sup>3</sup> The Commission found that a public opinion survey employing the rules of random selection showed that 93.4% of the passengers were not opposed to transit radio, 76.3% were in favor, 13.9% didn't care, 3.2% didn't know, and 6.6% were not in favor. Of the 6.6%, only 3% were firmly opposed to transit radio. (R. 119.) These findings are supported by the record (R. 35, 38, 69, 70, 71), which showed that the survey was made by trained investigators under scientific conditions (R. 62-71), and that the results in Washington are comparable with the favorable public opinion in other areas (R. 40-42, 85).



action" within the meaning of the Fifth Amendment to the Constitution;

(2) In holding that reception of broadcasts in the vehicles of a privately owned carrier deprive objecting passengers of liberty without due process of law;

(3) In holding that the Government is required by the Fifth Amendment to restrain communication with public conveyances if some passengers object and in failing to hold that the liberties protected by the Fifth Amendment are relative and subject to the adjustment of competing private interests for the benefit of the general public by the legislative and executive branches of the Government acting in accordance with established processes of law;

(4) In holding that the First Amendment does not protect the dissemination of news programs, weather reports, and other announcements important to the convenience and safety of the public and that it does not protect "commercial advertising" where the necessary effect of its elimination would be to terminate the dissemination of news, music, and other information important to the convenience and safety of the public;

(5) In failing to hold that that public has no constitutional right to utilize the services of a common carrier;

(6) In holding that the Commission erred as a matter of law: (a) in failing to find that radio reception on Capital Transit vehicles constitutes unreasonable service; (b) in finding such reception not inconsistent with public convenience; and (c) in failing to stop such reception;

(7) In holding that respondents' private rights were invaded by the Commission's order dismissing its own investigation into questions of public convenience, comfort, and safety;

(8) In reviewing and vacating the Commission's order on the basis of matters outside of the record certified to

it and matters not a part of the evidence of record before the Commission;

(9) In requiring the Commission to conduct further proceedings.

### **REASONS FOR GRANTING THE WRIT.**

Petitioners submit that a writ of certiorari should be granted in this case under Subdivisions 5(b) and 5(c) of Rule 38 of this Court, because:

(1) The question whether there is a constitutionally protected right of freedom from listening is a novel question of general importance relating to the construction of the Fifth Amendment to the Constitution of the United States, which has not been, but should be, settled by this Court. The application of that Amendment to the actions of a private carrier in receiving radio programs on its vehicles is unprecedented, a fact attested by the decision of the lower court, wherein it stated: "No occasion had arisen until now to give effect to freedom from forced listening as a constitutional right" (R. 128). Settlement of the question by this Court is in the public interest, since it is presented in other similar situations throughout the country (R. 40), where a transit company is operating pursuant to governmental regulation.

(2) The lower court throughout its decision confuses the Constitutional limitations upon governmental power to restrain communication with its novel theory that the Constitution requires Government, without regard to its legislative will, to restrain communications. The Court apparently relies upon the case of *Kovacs v. Cooper*, 336 U. S. 77, as support for this principle. In the *Kovacs* case this Court upheld a municipal ordinance prohibiting loud and raucous sound trucks in public streets as not being in violation of the First Amendment. However, the *Kovacs* case did not hold that the City was compelled by the Constitution to pro-

hibit the noise and that, if it did not do so, its failure to prohibit the noise would deprive persons annoyed by it of liberty without due process of law. The lower court has applied this latter construction of the *Kovacs* case.

(3) The decision of the court below is in conflict with the well settled principle that the Fifth Amendment "is a limitation only upon the powers of the general Government", *Talton v. Mayes*, 163 U. S. 376, 382, and is not directed against the actions of individuals, *Corrigan v. Buckley*, 271 U. S. 323.

The holding of the court below that actions of Capital Transit constitute "governmental action" because it operates under governmental authority, because it enjoys a virtual monopoly since competition is only permitted if public convenience is served,<sup>4</sup> and because its services are regulated by the Commission pursuant to an Act of Congress, is in conflict with decisions of this Court and of the Third Circuit Court of Appeals.<sup>5</sup> This Court held in the *Civil Rights Cases*, 109 U. S. 3, that the acts of common carriers do not constitute "governmental action". It is also in conflict in principle with the decision of the Third Circuit Court of Appeals in *McIntire v. William Penn Broadcasting Company of Pennsylvania*, 151 F. (2d) 597.

<sup>4</sup> The court below referred to Section 4 of the Merger Act (Section 44-201, D. C. Code, 1940) as preventing competition. That Section permits competition when the public interest requires it under a standard essentially the same as provided in the familiar provisions of the Interstate Commerce Act which permit a wide range of discretion in the Commission in permitting competition. See *United States v. Detroit & Cleveland Nav. Co.*, 326 U. S. 236; *Interstate Commerce Commission v. Parker*, 326 U. S. 60. In fact another carrier is authorized to do business within the District. (R. 39).

<sup>5</sup> It might also be noted that the lower court's decision is in conflict with the District Court for the Western District of Missouri in the case of *Lundberg v. Chicago Great Western Ry. Co.*, 76 F. Supp. 61, wherein the court refused to hold that the actions of a railroad came within the prohibitions against governmental action set forth in the Fifth and Fourteenth Amendments.

In support of its holding that the actions of a privately owned common carrier are "governmental action", the court below has cited the cases of *Smith v. Allwright*, 321 U. S. 649, and *Rice v. Elmore*, 165 F. (2d) 387, holding that the acts of political parties performing governmental functions constitute "governmental action"; *Marsh v. Alabama*, 326 U. S. 501, holding that the acts of a privately owned town performing governmental functions were "governmental actions"; and *American Communications Association v. Douds*, 339 U. S. 382, in which it was conceded by all parties, and contested by none, that an act of Congress is "governmental action". These cases are clearly inapposite. In relying upon them, the court below completely misapplied them and extended their holdings beyond any boundaries remotely suggested by this Court. The functions of a common carrier are not governmental functions even though its services involve the public interest and may be subject to governmental regulation.

The dismissal of the Commission's investigation did not elevate the prior independent actions of Capital Transit to the level of governmental action. The Commission's order only dismissed its own investigation into public questions of convenience, comfort, and safety. It did not dismiss any complaint of respondents, nor did it determine any of their private rights. Radio reception on transit vehicles was initiated and continues independently of, and without the necessity for any order of, the Commission sanctioning such reception. Section 43-705, D. C. Code, 1940, under which respondents appealed to the District Court, does not authorize appeals from actions of Capital Transit, Transit Radio, or of Congress. It authorizes appeals only from orders of the Commission under prescribed conditions.

(4) The lower court's decision that the dissemination of programs by Capital Transit and Washington Transit Radio are not protected by the First Amendment, because such programs have as a part thereof commercial advertising, is in conflict with the decisions of this Court in the cases



of *Jamison v. Texas*, 318 U. S. 413, and *Schneider v. State of New Jersey*, 308 U. S. 147. In the *Jamison* case it was held that the dissemination of constitutionally protected information cannot be prohibited under the First Amendment merely because commercial advertising is also used in connection therewith. Since a substantial part of the constitutionally protected information disseminated by radio and press is intermingled with, and economically supported by, commercial advertising, it is in the public interest to settle the question whether the government may constitutionally terminate these media of mass communication by holding commercial advertising unlawful.

(5) The lower court has taken upon itself to reconcile and adjust competing constitutional interests, to balance the relevant factors, and to ascertain which of the competing interests is to prevail. There is no specific legislation governing the subject. In so doing the lower court has made itself the arbiter of the paramount public interest, and its decision involves a question of substance concerning the extent of the Commission's and Court's duties and powers under the applicable statutes. The court below also has intruded directly upon the legislative function of determining the public interest and the constitution of reasonable service, although such function has been delegated to a regulatory body. In so intruding, the court below has acted in direct conflict with this Court's decision in the case of *Honolulu Rapid Transit and L. Company v. Hawaii*, 211 U. S. 282. See also *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246.

(6) In holding that radio reception on Capital Transit's vehicles deprived objecting passengers of constitutional rights, the court below ignored the prior decisions of this Court which show that passengers have no constitutional rights to use the services of Capital Transit and that their rights are governed wholly by statutes that do no more than require equal and non-discriminatory treatment of all.

*Civil Rights Cases, supra*, page 25 of 109 U. S.; *Hollis v. Kutz*, 255 U. S. 452, 454-455.

(7) The court below has so far departed from the accepted and usual course of judicial proceedings on review of administrative orders, contrary to the specific requirements of Sections 43-705 and 43-706, D. C. Code, 1940, as to call for an exercise of this Court's power of supervision. The court has, contrary to the cited statutes, vacated the Commission's order on the basis of evidence not of record before the Commission or certified to that court and has directed further proceedings by the Commission in the absence of any statutory duty of the Commission to proceed. See *N. L. R. B. v. Newport News S. & D. D. Co.*, 308 U. S. 241, 249. In considering matters outside of the record certified to it, the lower court has acted in violation of Rule 75(g) F. R. C. P., which states that "only matter certified and transmitted constitutes the record on appeal".

### CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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**APPENDIX.****Federal Constitution.****Amendment I.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Amendment V.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Statutes.****Section 43-415, D. C. Code, 1940. Hearings after summary investigation.**

If after making such investigation the commission becomes satisfied that sufficient grounds exist to warrant a formal hearing being ordered as to the matters so investigated, it shall furnish such public utility interested a statement notifying the public utility of the matters under investigation. Ten days after such notice has been given the commission may proceed to set a time and place for a hearing and an investigation as hereinbefore provided. (Mar. 4, 1913, 37 Stat. 984, ch. 150, Sec. 8, par. 45.)

**Section 43-416, D. C. Code, 1940. Notice of hearing—Hearing to be conducted as though complaint had been filed.**

Notice of the time and place for such hearing shall be given to the public utility and to such other interested per-

sons as the commission shall deem necessary, as provided in section 43-410, and thereafter proceedings shall be had and conducted in reference to the matter investigated in like manner as though complaint had been filed with the commission relative to the matter investigated, and the same order or orders may be made in reference thereto as if such investigation had been made on complaint. (Mar. 4, 1913, 37 Stat. 984, ch. 150, sec. 8, par. 46.)

**Section 43-705, D. C. Code, 1940. Appeal to District Court from certain orders—Precedence over other, civil causes—Proceeding when additional evidence proper—Statement to accompany decision—Subsequent appeals—Commission not liable for costs or damages.**

The District Court of the United States for the District of Columbia shall have jurisdiction to hear and determine any appeal from an order or decision of the Commission. Any public utility or any other person or corporation affected by any final order or decision of the Commission, other than an order fixing or determining the value of the property of a public utility in a proceeding solely for that purpose, may, within sixty days after final action by the Commission upon the petition for reconsideration, file with the clerk of the District Court of the United States for the District of Columbia a petition of appeal setting forth the reasons for such appeal and the relief sought; at the same time such appellant shall file with the Commission notice in writing of the appeal together with a copy of the petition. Within twenty days of the receipt of such notice of appeal the Commission shall file with the clerk of the said court the record, including a transcript of all proceedings had and testimony taken before the Commission, duly certified, upon which the said order or decision of the Commission was based, together with a statement of its findings of fact and conclusions upon the said record, and a copy of the application for reconsideration and the orders entered thereon: *Provided*, That the parties with the consent and approval of the Commission, may stipulate in writing that only certain portions of the record be transcribed and transmitted. Within this period the Commission or any other interested party shall answer, demur, or otherwise move or plead. Thereupon the appeal shall be at issue and ready for hearing. All such proceedings shall have precedence



over any civil cause of a different nature pending in said court, and the District Court of the United States for the District of Columbia shall always be deemed open for the hearing thereof. Any such appeal shall be heard upon the record before the Commission, and no new or additional evidence shall be received by the said court. The said court, or any justice or justices thereof, before whom any such appeal shall be heard, may require and direct the Commission to receive additional evidence upon any subject related to the issues on said appeal concerning which evidence was improperly excluded in the hearing before the Commission or upon which the record may contain no substantial evidence. Upon receipt of such requirement and direction the Commission shall receive such evidence and without unreasonable delay shall transmit to the said court the findings of fact made thereon by the Commission and the conclusions of the Commission upon the said facts.

Upon the conclusion of its hearing of any such appeal the court shall either dismiss the said appeal and affirm the order or decision of the Commission or sustain the appeal and vacate the Commission's order or decision. In either event the court shall accompany its order by a statement of its reasons for its action, and in the case of the vacation of an order or decision of the Commission the statement shall relate the particulars in and the extent to which such order or decision was defective.

Any party, including said Commission, may appeal from the order or decree of said court to the United States Court of Appeals for the District of Columbia, which shall thereupon have and take jurisdiction in every such appeal. Thereafter the Supreme Court of the United States may, upon a petition for certiorari granted in its discretion, review the said case.

Said Commission shall not, nor shall any of its members, officers, agents, or employees, be taxed with any costs, nor shall they or any of them be required to give any supersedeas bond or security for costs or damages on any appeal whatsoever. Said Commission, or any of its members, officers, agents, or employees, shall not be liable to suit or action or for any judgment or decree for any damages, loss, or injury claimed by any public utility or person, nor required in any case to make any deposit for costs or pay for any service to the clerks of any court or to the marshal of the United States. (Mar. 4, 1913, 37 Stat. 989, ch. 150, sec. 8, par. 65; Aug. 27, 1935, 49 Stat. 882, ch. 742, sec. 2.)

**Section 43-706, D. C. Code, 1940. Appeal limited to questions of law.**

In the determination of any appeal from an order or decision of the Commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary, or capricious. (Mar. 4, 1913, 37 Stat. 989, ch. 150, sec. 8, par. 66; Aug. 27, 1935, 49 Stat. 883, ch. 742, sec. 2.)

**Section 44-201, D. C. Code, 1940. Competing lines—  
Certificates of convenience and necessity.**

No competitive street railway or bus line, that is, bus or railway line for the transportation of passengers of the character which runs over a given route on a fixed schedule, shall be established without the prior issuance of a certificate by the Public Utilities Commission of the District of Columbia to the effect that the competitive line is necessary for the convenience of the public. (Jan. 14, 1933, 47 Stat. 760, ch. 10, sec. 4.)

**Rules.**

**Rule 75(g), Federal Rules of Civil Procedure. Record on Appeal to a Court of Appeals.**

**Record to be Prepared by Clerk—Necessary Parts.** The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court, a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on ap-

peal. The clerk shall transmit with the record on appeal a copy thereof when a copy is required by the rules of the court of appeals. The copy of the transcript filed as provided in subdivision (b) of this rule shall be certified by the clerk as a part of the record on appeal and the clerk may not require an additional copy as a requisite to certification. (As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.)

AUG 30 1951

CHARLES J. MOORE, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1951.

No. 224.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA,  
CAPITAL TRANSIT COMPANY, AND WASHINGTON TRANSIT  
RADIO, INC., *Petitioners,*

v.

FRANKLIN S. POLLAK AND GUY MARTIN, *Respondents.*

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit.

**MEMORANDUM BRIEF FOR THE RESPONDENTS.**

No.

**295**

FRANKLIN S. POLLAK AND GUY MARTIN, *Petitioners,*

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA,  
CAPITAL TRANSIT COMPANY, AND WASHINGTON TRANSIT  
RADIO, INC., *Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT.**

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT.**

*To the Honorable the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

Franklin S. Pollak and Guy Martin, appellants below,  
and respondents in No. 224 and petitioners in No. ....,  
submit that the writ prayed for in No. 224 should be issued

for reasons set forth hereinafter and pray that if that writ is issued (but only in that event) a writ of certiorari be issued on their behalf in No. .... to review the judgment in these causes entered by the United States Court of Appeals for the District of Columbia Circuit on June 1, 1951 (R. 132).

### **OPINIONS BELOW.**

The opinion and order of the Public Utilities Commission (R. 114-122) is reported in 81 P.U.R.N.S. 122. The opinion of the District Court (R. 2-3) dismissing the original petition of appeal from the order of the Public Utilities Commission is unreported. The opinion of the United States Court of Appeals for the District of Columbia Circuit reversing the District Court (R. 124-131) is published in the printed record at pp. 124-131.

### **JURISDICTION.**

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 1, 1951. The jurisdiction of this Court is invoked in No. .... under Title 28, United States Code, Section 1254(1) and the District of Columbia Code, 1940, Title 43, Section 705.

### **STATEMENT OF THE CASE.**

The principal facts of the case are set forth succinctly in the opinion of the court below (R. 124).

The judgment of the court below (R. 132) gave to these respondent-petitioners less than the full relief which they sought before the Public Utilities Commission. Before the Commission they sought an order totally prohibiting the broadcasts in question—words and music alike (Application for Reconsideration, —) (Tr. Doc. No. 48).<sup>1</sup> The opinion of the Court of Appeals stated:

<sup>1</sup> The Application for Reconsideration has not been printed but is part of the record in this Court. It was Item 48 of the proceedings before the Public Utilities Commission as certified by the



"This decision applies to 'commercials' and to 'announcements'. We are not now called upon to decide whether occasional broadcasts of music alone would infringe constitutional rights. (R. 130)."

The judgment of the Court of Appeals remanded the cause to the District Court with directions to remand to the Commission for further proceedings in conformity with the opinion of the Court of Appeals. The judgment thus requires the Commission to prohibit only "commercials" and "announcements". It does not require the Commission to prohibit any other spoken parts of the broadcasts, if there are spoken parts not falling within the categories of "commercials" and "announcements" as those terms are used in the opinion; and it does not require the Commission to prohibit the musical portions of the broadcasts.<sup>2</sup>

### QUESTIONS PRESENTED.

In the view of these respondents-petitioners, this case involves one ultimate question:

---

Commission to the District Court; was made part of the record in the Court of Appeals by an order of the District Court entered August 24, 1950; and is part of the original transcript of record in the Court of Appeals transmitted to this Court pursuant to an order of that court entered August 6, 1951. The District Court's order of August 24, 1950, and the stipulation of the same date on which it was based are themselves part of the record in this Court (Tr. 44, 47, 55); they define the portions of the proceedings before the Public Utilities Commission which are part of the record in this Court.

<sup>2</sup> The musical portions of the broadcasts are not covered by either the first or second sentence quoted above from the Court of Appeals' opinion. They are not "commercials" or "announcements", to which the Court of Appeals says its decision applies. Equally they are not "occasional broadcasts of music alone", the constitutional status of which the Court of Appeals says it is not called upon to determine: they are not "occasional" and they are not "alone". It seems clear, however, that the first sentence controls and that the musical portions of the broadcasts are not barred by the order below.

May the Public Utilities Commission of the District of Columbia approve and ratify a requirement of the monopoly transit company that all bus and streetcar passengers must, as a condition of riding, be subjected to the loudspeaker rendition of radio programs of one radio station which the transit company has, for a money consideration, contracted to impose on the riders?

This ultimate question turns, in our view, on the following primary questions, which we consider to be the questions presented in this case:

1. Whether these broadcasts, as alleged in the petition of appeal, deprive these respondents-petitioners and other objecting riders of their rights under the First Amendment to the United States Constitution by forcing on them speech which they do not wish to hear, by making it difficult or impossible for them to hear speech of others which they do wish to hear, by making it difficult or impossible for them to read printed words which they do wish to read, by making it difficult or impossible for them to speak to others as they choose, and by generally interfering with their freedom to listen or not to listen, and to read or not to read.
2. Whether these broadcasts, as alleged in the petition of appeal, deprive these respondents-petitioners and other objecting riders of their liberty in violation of the Fifth Amendment to the United States Constitution by depriving them of the free use of their faculties.
3. Whether these broadcasts, as alleged in the petition of appeal, deprive these respondents-petitioners and other objecting riders of their property in violation of the Fifth Amendment to the United States Constitution by depriving them of the use of their time and by endangering their health, for the private benefit of others and without compensation.

It is to be noted that these questions, as stated, do not even by implication distinguish between the portions of

the broadcasts which consist of words and the portions which consist of music, except at one point. The forcing upon objecting riders of speech which they do not wish to hear necessitates the use of words and cannot be done by music. But in every other aspect the questions presented, as stated above, are presented at least as fully by the music as they are by the words.

It may, however, be the law of this Court that, since the judgment of the Court of Appeals is limited to "commercials" and "announcements", the questions enumerated above are presented in No. 224 only in so far as they are raised by "commercials" and "announcements". If so—and in any event—the above enumerated questions, as raised by the *other* portions of the broadcasts, are presented by our cross petition for certiorari in No. —.

### STATUTES INVOLVED.

The pertinent constitutional and statutory provisions are printed in the Appendix to the petition in No. 224.

### REASONS FOR GRANTING THE WRITS.

#### In No. 224.

We believe that the decision below was correct in so far as it granted us the relief which we sought.

We believe also that the "questions presented", as stated by petitioners in No. 224, are not the questions actually presented—mainly because they are stated without mention of what we consider to be the crucial fact of the governmentally-conferred monopoly of Capital Transit Company and because, in our view, the court below did not rely on evidence outside the record in reaching its result. We believe further that the "reasons for granting the writ", as stated by petitioners in No. 224, are in general open to the same objections.

We do not, however, pursue these objections because in our view there are other—and important—reasons for granting the writ.

**A. Freedom of Communication by Writing or Speech and Freedom of Reflection—Both of Which Are Impaired by Transit Radio Are Basic to the Functioning of Our Democracy.**

The interest of the public, as well as of the speaker, in freedom of speech and the importance, in a democracy of freedom of communication and freedom of reflection are so apparent and have been so emphatically stated in opinions in this Court that elaboration is unnecessary. *American Communications Ass'n v. Douds*, 339 U. S. 382, 402 (1950); *Martin v. Struthers*, 319 U. S. 141, 148 (1943); *Marsh v. Alabama*, 326 U. S. 501 (1946); *Saia v. New York*, 334 U. S. 558 (1948).

Transit radio, within its sphere, violates these freedoms.

**B. Forced Listening by a Captive Audience to Editorial Matter Selected by Private Individuals Involves Grave Dangers.**

The dangers of requiring that any audience listen to opinions and exhortations, whether open or by implication, selected by a small group of men, to which no reply in the same medium can very effectively be made, are so vivid in the recollections of all of us as fully to justify the intervention of this Court to do all that the judicial power permits in the prevention of the intolerable situation to which such practices can lead.

Moreover, the broadcasts which have been made to the captive audience in the vehicles of Capital Transit Company illustrate here and now the reality of the dangers which experience elsewhere has warned of. In their most innocuous form the public service announcements have urged this audience to contribute to the Red Cross, the Community Chest and other charities. Even these announcements represent opinions on matters concerning which necessarily all men do not agree. But the tendency to present opinions of a plainly controversial character has proven irresistible. Some of these are in the record in



this case. Others, having occurred subsequent to the hearing before the Commission, are not. But this Court, we submit, may take notice of broadcasts known to the thousands of riders who were subjected to them.

The power over this captive audience has been used in the personal interest of Washington Transit Radio, Inc. and Capital Transit Company to influence public opinion on the merits of transit radio itself.

Subsequent to the hearing before the Public Utilities Commission there have been other broadcasts expressing, directly or by implication, views favorable to transit radio.

There have been also other broadcasts on other subjects which were plainly of a controversial character. For example on April 19, 1951, the address of General of the Army Douglas MacArthur to Congress was broadcast in full to the riding public as he was making it.

**C. The Threatened Nationwide Expansion of the Transit Radio Enterprise Cannot Be Dealt With by an Opinion of the United States Court of Appeals for the District of Columbia Circuit and Justifies the Attention of This Court.**

The transit radio system is in operation in some 19 cities of the United States. Headquarters of the system are maintained at Cincinnati, Ohio. There is a national agency which acts as sales representative for all cities. It is, as its proponents say, the only method by which radio can deliver a guaranteed audience.

Referring specifically to the petition to this Court in No. 224, the "national" or "parent" company of the system, Transit Radio, Inc. circulated under date of July 25, 1951, a statement containing the following:

"We are now petitioning the Supreme Court for writ of certiorari, and it is expected that the court will either grant or deny this sometime in October. If granted, and the great majority of counsel is of the opinion that it will be, the case of Transit Radio versus several Washington attorneys should be heard during the fall term of the Supreme Court and a decision

might reasonably be expected sometime between February and June. This means, of course, that the expansion of Transit Radio into new cities, as well as revival in others, is out of the question until final action by the court and, the responsibility of supporting the legal costs falls upon the shoulders of Transit Radio, Inc. and its principal stations."

Representatives of the system have urged the Federal Communications Commission to encourage the development and expansion of transit radio as a means of advancing the FM method of broadcasting.

In the absence of a declaration by this Court in these proceedings concerning the constitutional rights of the riding public it seems likely that transit radio will continue in the other cities where it is now functioning and perhaps even expand into still other cities, operating as a correlated system of broadcasting to captive audiences of many millions, unless in other cities lawyers and citizens' organizations undertake the substantial burden of duplicating in large measure the effort which has been made in Washington over a period of nearly two years, in which event this Court is likely to be asked again to rule upon these issues.

#### **D. There Is Substantial Authority in Support of Our Position on the Questions Presented.**

##### **1. AS TO THE FIRST AMENDMENT.**

On the interest of the public in freedom of communication: *Grosjean v. American Press Publishing Company*, 297 U. S. 233.

On the right of the prospective listener or reader to decide for himself whether or not he will read or listen: *Martin v. Struthers*, 319 U. S. 141; *William Ernest Hocking, Freedom of the Press* (1947) 161-2.

On the right of the radio listener under the First Amendment as superior to the right of the radio speaker under the First Amendment: *National Broadcasting Co. v.*

*F. C. C.*, 47 F. Supp. 940 (D. C. N. Y. 1942), affirmed, 319 U. S. 190.

## 2. AS TO LIBERTY UNDER THE FIFTH AMENDMENT.

Nothing need be added to the discussion in the opinion below (R. 124-131).

## 3. AS TO PROPERTY UNDER THE FIFTH AMENDMENT.

*United States v. Causby*, 328 U. S. 256, held that where noise impaired the value of a building—among other ways, by interfering with the owner's sleep and damaging his health—there was a taking of property for which the Government was required by the Fifth Amendment to give compensation.

## 4. AS TO PERSONAL SECURITY, LIBERTY AND HEALTH.

The right of personal security and personal liberty includes a person's right to the "legal and uninterrupted enjoyment of his life, his limbs, his body [and] his health," and when the law guarantees to one the right to the enjoyment of his life, it gives him something more than the mere right to breathe and exist. 1 Blackstone's Commentaries, 129 *et seq.* The right of liberty which is guaranteed to every person by the Constitution also includes those "rights essential to the orderly pursuit of happiness by free men" (*Meyer v. Nebraska*, 262 U. S. 390), the "right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator" and "the right to be let alone". *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S. E. 68 (1904).

## In No.

The cross writ of certiorari which we seek in No. .... should be issued so that if the writ is granted in No. 224 this Court, without any possible procedural obstacle, can consider the broadcasts as a whole—both music and textual

material—and can apply to the broadcasts as a whole—both music and textual material—the constitutional objections which we make against them.

As the petitioners in No. 224 correctly state in their petition (p. 4) the broadcast “consist primarily of music”. At the time of the hearing the broadcasts were continuous from 7 a.m. to 7 p.m. They now continue until 10 p.m. The allegations which these respondents-petitioners made against the broadcasts in their petition of appeal in the District Court did not draw a distinction between music and words, and the record clearly shows that objections made by objecting riders have in many cases been based upon the broadcasts as a whole, without distinction between music and words, or have been directed specifically at the music (Opinion of the Public Utilities Commission, R. 114-120). The objections make it clear that the music as well as the words is itself a violation of the First Amendment through interfering with freedom to read and converse itself infringes liberty in violation of the Fifth Amendment by interfering with the free use of one’s faculties and itself takes property in violation of the Fifth Amendment by interfering with the use of one’s time and by endangering health.

Finally, forced listening devices disrupt and endanger the “American System of Broadcasting” and is thus a matter of national concern.

The United States of America has a unique system of broadcasting supported by commercial advertising. Currently, the industry is on the threshold of a tremendous expansion into television. Already there are 13,000,000 television receivers in use. Color television is in the offing. Proposals to convert television broadcasting into a form quite different from that which has prevailed in aural broadcasting are being discussed. Wired television, subscription television, pay-as-you-look phonevision, theater television, each has its advocates. Advertising revenue, apparatus sales and the correlated industrial applications have grown to a point where billions of dollars are involved.



Transit radio alone excepted, this whole vast structure, with all its social and economic impacts, derives its vital force from the principle that the listener or viewer shall have the absolute and unrestricted right to elect whether or not his receiver shall be placed in operation and if so, to what station it shall be tuned. Unless the listener or viewer is completely free to select what he wishes to hear or see in a freely competitive field, the American system of broadcasting is deprived of its vigor and becomes a sinister, formless thing.

Cast and direction must, as an administrative matter, be given to the development of television by the appropriate regulatory authority. That is not a judicial function. It is, however, essential that the administrative function be exercised in conformity with law. The importance of a decision by the Supreme Court of the United States at this stage affirming the inviolable right of the public to select its broadcast programs is self evident.

### CONCLUSION.

For the foregoing reasons, in the event that a petition for writ of certiorari is granted in No. 224, it is respectfully requested that the writ issue in No.

Respectfully submitted,

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August 30, 1951.

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**BRIEF FOR THE PETITIONERS** **CHARLES ELMORE CROPLEY**  
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**IN THE**  
**Supreme Court of the United States**

**OCTOBER TERM, 1951**

**No. 224**

**PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF  
COLUMBIA, CAPITAL TRANSIT COMPANY, AND WASH-  
INGTON TRANSIT RADIO, INC., *Petitioners,***

**v.**

**FRANKLIN S. POLLAK AND GUY MARTIN, *Respondents.***

**On Writ of Certiorari to the United States Court of Appeals  
for the District of Columbia Circuit**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1951

—  
No. 224  
—

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF  
COLUMBIA, CAPITAL TRANSIT COMPANY, AND WASH-  
INGTON TRANSIT RADIO, INC., *Petitioners,*

v.

FRANKLIN S. POLLAK AND GUY MARTIN, *Respondents.*

—  
On Writ of Certiorari to the United States Court of Appeals  
for the District of Columbia Circuit

—  
**BRIEF OF PETITIONERS**  
—

**OPINIONS BELOW**

The opinion and order of the Public Utilities Commission (R. 114-122) appealed by respondents to the United States District Court for the District of Columbia is reported in 81 P.U.R. (N.S.) 122. The opinion of the District Court (R. 2-3) dismissing the original petition of appeal is unreported. The opinion of the United States Court of Appeals for the District of Columbia reversing the District Court (R. 124-131) is reported in U.S. App. D.C. and 191 F. 2d 450.

## JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on June 1, 1951 (R. 132), and a petition for a rehearing was denied on July 6, 1951 (R. 167). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1) and D.C. Code, Sec. 43-705 (1940 ed.).

## QUESTIONS PRESENTED

(1) Whether any private rights of respondents were invaded by the Commission's order dismissing its own investigation limited to questions of public convenience, comfort and safety.

(2) Whether the public has a constitutional right to utilize the services of a private common carrier or whether such rights as they may have exist only by virtue of existing statutes.

(3) Whether the Commission erred as a matter of law: (a) in failing to find that radio reception on Capital Transit vehicles constituted unreasonable service; (b) in finding such reception not inconsistent with public convenience; and (c) in failing to stop such reception.

(4) Whether the reception of radio programs on the vehicles of a private carrier, operating under governmental authority and subject to governmental regulation, is "governmental action" within the meaning of the Fifth Amendment to the Constitution.

(5) Whether a minority of passengers objecting to radio broadcasts on streetcars and buses are deprived of liberty without due process of law under the Fifth Amendment when, after hearing, the Public Utilities

Commission, upon an investigation initiated by it, finds on the basis of substantial evidence of record that such radio reception is not contrary to the public convenience, comfort and safety, but rather improves conditions under which the public rides, and then dismisses its own investigation on those subjects.

(6) Whether the Government is required by the Fifth Amendment to restrain communication with public conveyances if some passengers object or whether, instead, the liberties protected by the Fifth Amendment are relative and subject to the adjustment of competing private interests for the benefit of the general public by the legislative and executive branches of the Government acting in accordance with established processes of law.

(7) Whether radio communication of news, weather reports and other announcements that are important to the convenience and safety of the public are protected by the First Amendment of the Constitution only if commercial advertising messages are not included or whether such commercial messages are protected by the First Amendment when their elimination by Government would terminate the dissemination of constitutionally protected information to the public.

(8) Whether the court may consider and weigh matters outside the record before the Commission and the court, find ultimate facts different than the Commission found, reach contrary conclusions, and then require the Commission to proceed in accordance therewith.

## STATUTES INVOLVED

The pertinent constitutional provisions, statutes, and rules are printed in the appendix to this brief.

## STATEMENT OF FACTS

In 1948, Capital Transit Company (Transit) and Washington Transit Radio, Inc. (Radio) entered into a contract under which Radio installed and maintained radio receiving equipment in a substantial number of Transit's street cars and buses (R. 34-36, 102-110). A number of months after the institution of this radio service in Transit's vehicles, the Public Utilities Commission of the District of Columbia (Commission) initiated an investigation on its own motion, by giving the notice required by D.C. Code, Sec. 43-415 (1940 ed.) (R. 28). The Commission stated that the purpose of this proceeding was to determine "whether or not the installation and use of radio receivers on the street cars and buses of Capital Transit Company is consistent with the public convenience, comfort and safety . . ." (R. 28). The Commission's investigation was not initiated on the complaint of the Respondents, but they were subsequently allowed to intervene in that investigation.

The record of proceedings before the Commission shows that Transit receives revenue in return for granting to Radio the privilege of installing receivers in its vehicles and that this revenue helps Transit to meet its operating costs (R. 35-37, 107-108). There were installed, at the time of the investigation, 212 radio sets out of a contemplated 1500 installations (R. 37, 116). The receivers are tuned to station WWDC-FM, which transmits programs of selected music, newscasts, weather and time reports, and other public



service announcements important to the convenience and safety of the public (R. 38, 75, 86). Interspersed with these items are short commercial announcements which are limited by contract to sixty seconds duration, not to exceed a total of six minutes in any hour (R. 106, 140), but which actually do not exceed thirty-five seconds in duration (R. 141).

The radio signals are regularly checked and kept at a low level for comfortable listening (R. 96-100). Both subjective and objective tests show that these signals do not hinder or prevent normal communication on street-cars and buses (R. 31, 33, 76, 91), and it is not possible to measure acoustically on those vehicles any difference in the sound level which has been contributed by radio reception (R. 91, 113). The record shows (R. 91-93) and the Commission found (R. 119-120) that the hearing of Transit radio programs "is a matter of the working of the mind" and that "a person can differentiate between sounds or can get used to a sound and put it out of his mind." This fact was also stated by one of the only two Transit rider witnesses who testified before the Commission in opposition to the broadcasts (Transcript of original proceedings before the Commission, pp. 495-499):

"I think I agree with the psychiatrist and the engineer here who said, 'you can shut off your mind to what you don't want to hear,' and therefore, I think most people shut off their minds to commercials."

The Commission found that the Federation of Citizens Associations, the North Washington Council, representing twenty-two different associations, and many other citizens' associations, as well as associations of Federal employees and businessmen, appeared before

the Commission in support of Transit radio; there were few such organized public associations opposed (R. 117).

Determinations of the public preference for radio programs in Transit's vehicles were twice made by trained investigators under recognized scientific random sampling methods (R. 62-71). The first of these surveys was made in April, 1949 (R. 66), prior to the Commission's commencement of its investigation of such programs in July of the same year (R. 28). Its purpose was to determine the reaction of Transit customers to radio programs (R. 66), with a view to determining for Transit's own benefit whether the public would like such programs to become a part of Transit's regular service (R. 35, 69). The second survey was made in October, 1949 (R. 69-70), after consultation with the Commission (R. 71). The results of the two surveys were in substantial agreement (R. 69, 70-71); and the Commission found on the basis of the second survey that 93.4% of the Transit-riding public was not opposed to Transit radio programs and that 76.3% were in favor of them (R. 119). Those not in favor of such programs amounted to 6.6% of the people interviewed, but only 3% of those interviewed stated that they would oppose the majority will on the matter (R. 71, 119).<sup>1</sup>

On December 19, 1949, by Order No. 3612, the Commission issued its findings, opinion, and order dismissing its investigation (R. 114-120). In so doing, the Commission, after analyzing the evidence before it in some detail, found and concluded:

---

<sup>1</sup> Radio receiving sets have been installed in the vehicles of transit companies in fourteen cities in the United States (R. 40). The favorable reaction in Washington is comparable with favorable public opinion in these other cities (R. 41-42).

"From the testimony of record, the conclusion is inescapable that radio reception in street cars and busses is not an obstacle to safety of operation.

"Further, it is evident that public comfort and convenience is not impaired and that, in fact, through the creation of better will among passengers, it tends to improve conditions under which the public rides.

"In the light of these conclusions, it is obvious that the installation and use of radios in street cars and busses of the Capital Transit Company is not inconsistent with public convenience, comfort and safety." (R. 120.)

No question has been raised by Respondents as to the substantiality of the evidence in support of these findings.

On February 15, 1950, the Commission denied applications for reconsideration filed by the Respondents (R. 121-122).

Pursuant to D.C. Code, Sec. 43-705 (1940.ed.), Respondents appealed to the United States District Court for the District of Columbia from the Commission's Orders (R. 4). Transit, Radio, and the Commission each filed motions to dismiss the appeal (R. 16-18). The District Court granted all of these motions to dismiss, after concluding that "there is no legal right of the petitioners [Respondents] . . . which has been invaded, threatened, or violated by the action of the Public Utilities Commission . . ." (R. 3). The United States Court of Appeals for the District of Columbia Circuit reversed the District Court on the grounds that the broadcasts "deprive objecting passengers of liberty without due process of law" and instructed it to vacate the Commission's order and remand the case to the Commission for further proceedings in conformity with its

opinion (R. 124-131). This Court then granted certiorari to the Petitioners in respect of the Court of Appeals opinion in an order dated October 15, 1951. Although the lower court's opinion is by its own terms limited in application to Transit broadcasts of "commercials" and "announcements" (R. 130), this Court consented also to consider the constitutionality of Transit broadcasts of music alone by granting the Respondents' cross-petition for certiorari in No. 295.

### **SPECIFICATIONS OF ERRORS TO BE URGED**

The Circuit Court of Appeals erred:

(1) In holding that the Respondents' private rights were invaded by the Commission's order dismissing its own investigation into questions of public convenience, comfort and safety;

(2) In failing to hold that the public has no constitutional right to utilize the services of a common carrier;

(3) In holding that the Commission erred as a matter of law:

(a) in failing to find that radio reception on Capital Transit vehicles constitutes unreasonable service;

(b) in finding such reception not inconsistent with public convenience; and

(c) in failing to stop such reception;

(4) In holding that the actions of a privately owned common carrier, operating under governmental authority and subject to governmental regulations, is "governmental action" within the meaning of the Fifth Amendment to the Constitution;



(5) In holding that reception of broadcasts in the vehicles of a privately owned carrier deprive objecting passengers of liberty without due process of law;

(6) In holding that the Government is required by the Fifth Amendment to restrain communication with public conveyances if some passengers object and in failing to hold that the liberties protected by the Fifth Amendment are relative and subject to the adjustment of competing private interests for the benefit of the general public by the legislative and executive branches of the Government acting in accordance with established processes of law;

(7) In holding that the First Amendment does not protect the dissemination of news programs, weather reports, and other announcements important to the convenience and safety of the public and that it does not protect "commercial advertising" where the necessary effect of its elimination would be to terminate the dissemination of news, music, and other information important to the convenience and safety of the public;

(8) In reviewing and vacating the Commission's order on the basis of matters outside of the record certified to it and matters not a part of the evidence of record before the Commission;

(9) In requiring the Commission to conduct further proceedings.

## SUMMARY OF ARGUMENT.

1. The Commission did not invade any private rights of the Respondents when it ordered a dismissal of its investigation into the public aspects of Transit broadcasting.

Under the governing statutes, the sole question before the Commission was whether the reception of Radio's broadcasts on Transit's vehicles was inconsistent with public convenience, comfort and safety. This was the only question upon which the Commission had jurisdiction to act. The Respondents have no rights to use the private property of Transit, except as their rights have been defined by statutes and regulations thereunder. Based upon valid findings of fact—findings which neither the court below nor the Respondents have challenged—the Commission concluded that reception of the broadcasts was not inconsistent with public convenience, comfort and safety and, accordingly, dismissed its investigation. In this context it follows that the only question open on a Court review of the Commission's order dismissing its investigation is whether the Commission erred in concluding that such reception was not inconsistent with public convenience, comfort and safety.

The determination of reasonable service to the public is a function delegated by the Congress to the Commission and not to the Courts. The exercise of this function, which involves the reconciliation of conflicting interests of individuals, is essentially a legislative act. The Court of Appeals, ignoring this principle, intruded upon the legislative function of the Commission by erecting, without precedent or authority, a supposed Constitutional bar to the Commission's exercise of that function. And it did so on the basis of supposed private rights that could not properly be considered in the case

before it. Such an unwarranted intrusion on the legislative functions of a regulatory commission by a court runs squarely in the face of the many decisions of this Court condemning such intrusions, and calls for a reversal of the decision of the Court below.

**2. The instant case does not present any Fifth Amendment question relating to deprivation of liberty without due process since it lacks the element of governmental action requisite to raising such a question.**

The broadcasts of which the Respondents complain result entirely from the acts of Radio and of Transit, both privately owned corporations. Transit is subject to regulation pursuant to certain statutes, but none of these statutes either require or forbid Transit's use of a radio service in its streetcars and buses. Furthermore, the existence of governmental action cannot be derived in this case from any act of the Public Utilities Commission. The Commission was in no way connected with the installation of Transit's radio service, and its finding upon subsequent investigation that Transit broadcasts are not inconsistent with the public convenience, comfort and safety—the only basis upon which it might assume jurisdiction over such broadcasts—is supported by substantial evidence.

**3. The Court of Appeals erred in holding that any liberty of the Respondents affected by Transit broadcasting was taken without due process of law.**

The Court below failed to recognize the existence in the instant case of interests, including the right to listen, in conflict with those of the Respondents and improperly appropriated to itself the Commission's function of determining on the basis of evidence before it whether Transit's radio service is consistent with

the public convenience, comfort and safety. In determining whether Transit broadcasting is consistent with the public convenience, comfort and safety, the Commission was required to consider the merits of several competing interests involved. These interests were judged according to a reasonable statutory standard and with full respect for the procedural rights of all parties concerned.

**4. The Court of Appeals erred in relying on matters not in the record certified to it and so not properly before the Court.**

The Court violated applicable statutes in reversing the Commission's order upon the basis of matters not of record before the Commission.

**5. The Order of the Commission dismissing its investigation of Transit broadcasting does not infringe unconstitutionally upon any interest which the Respondents may assert under the First Amendment.**

The above described objections would be equally as applicable if the Court below had predicated its opinion on the First rather than the Fifth Amendment. Furthermore, the asserted liberty not to listen in public places is in serious conflict with the freedom to communicate, which is one of the principal guarantees of the First Amendment.

## **ARGUMENT**

### **I**

**No Private Rights of Respondents were Invaded by the Commission's Order Dismissing its Investigation Into the Public Aspects of Transit Radio.**

The District Court's dismissal of the Respondents' appeal from the Commission's Order was based squarely upon the Court's conclusion that "no legal



right of the petitioners [Respondents] . . . has been invaded, threatened, or violated by the action of the Public Utilities Commission . . ." (R. 3). The District Court merely decided that private rights were not invaded by the Commission, which was the only party accountable to the Court in this proceeding. The Court of Appeals seems to have overlooked the fact that the District Court was not called upon to decide whether some person other than the Commission might have invaded the private rights of the Respondents.

Transit's use of radio programs in its street cars and buses has been the subject of much discussion ever since those programs were inaugurated in 1948. Much of this comment has originated with a small group of people opposing such programs who more often than not have directed their objections to the emotions rather than to reason.<sup>2</sup> Frequently, they have drama-

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<sup>2</sup>This group received the vigorous support of some newspapers, many of which may well have been fearful of the competition offered by Transit Radio to their own news and advertising revenues. This point is illustrated with commendable frankness by the following editorial from the Washington Daily News of Friday, October 28, 1949:

#### "THE BURNING (EARS) ISSUE"

The Public Utilities Commission held its first hearing yesterday to find out what the general public thought of radios in street cars.

Practically everybody was there and violently partisan. So we might as well get in the act, too.

Our editorial position on this world-shaking issue is very simple. Thousands of bus and streetcar passengers buy our paper to read on street cars. Radio broadcasts and plugs interfere and compete with readers of printed news and ads. Therefore it interferes with us. Therefore, insofar as it affects us, we're against it.

But the general public is larger than the total News readership, and what the general public wants should prevail.

If the general public's taste has sunk so low that it really wants

tized their argument with distorted pictures of the true nature of Transit broadcasting and then have urged improper remedies to correct the evils which might result if those distortions were accurate. The use of such catch phrases as "captive audience" and "forced listening" with reference to broadcasts which are implied to be unreasonably loud and replete with tasteless advertising and bad music is only one example of this practice. The implications from these phrases and characterizations led the court below to assume, as a basic premise contrary to the evidence of record, that Transit passengers are inevitably forced to listen to Transit Radio whether they want to or not.

Such a description is not in accord with the facts of the case now before this Court. The radio service provided by Transit is unobtrusive in every respect, and the evidence of record and the Commission's findings show that passengers can normally ignore it if they wish to. It is played at a low volume; it consists predominantly of semi-classical music played by string orchestras or muted brass instruments. Interspersed with this music are short newscasts, weather reports, commercial announcements and other public service messages. The commercial announcements, which provide the revenue necessary to support the broadcasts,

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to torture itself with stupid, canned jive and vulgar commercials, why it's a free country.

But if, on the other hand, the intelligent and cultured Washington citizenry prefers quietly and comfortably to read our clever and informed columns in peace, why, who are we to say them nay? Price 3 cents on all newsstands.

If, in so clearly presenting this issue here, you think we've loaded the question, you're right."

are limited by contract to a maximum of six minutes per hour of broadcasting time.

The radio programs originate with Station WWDC in Washington, a station licensed by the Federal Communications Commission. The Communications Act (47 U.S.C., Sec. 151 *et seq.*) has been interpreted by the Federal Communications Commission as imposing upon each licensee the duty of fair presentation of news and controversial issues, the breach of which duty would jeopardize the license for continued operation. *Report on Editorializing by Licensees*; 1 Pike and Fischer R. R. 91:201 (1949). Broadcasting stations under the law, therefore, can not be the personal propaganda instruments of either Government or private persons.

The Public Utilities Commission determined that Transit broadcasting is not inconsistent with the public convenience, comfort and safety, and that it in fact tends to improve the conditions under which the public rides. It therefore issued the order dismissing its investigation of Transit's radio service from which the Respondents took the instant appeal. The substantiality of the evidence of record supporting that order has not been attacked, either by the Respondents or by the Court of Appeals.

Stripped of its emotional overtones, therefore, the principal question before this Court is whether the dismissal of the Commission's investigation into the public aspects of a radio service in Transit's street cars and buses, under applicable statutory standards, invaded the rights of the Respondents, as the Court of Appeals ruled it did. It thus is pertinent to inquire at the threshold into the precise nature of the Respondents' rights as Transit passengers in relation to the Com-

mission's action, on the basis of the evidence of record and the statutory framework guiding such action.

The Respondents have no rights, constitutional or otherwise, to use the private property of Transit as passengers, except as such rights have been defined by the public utility regulatory statutes applicable within the District of Columbia and regulations of the Public Utilities Commission thereunder. D.C. Code, Secs. 43-101 to 43-1007 (1940 ed.). Cf. *Hollis v. Kutz*, 255 U.S. 452, 454-455, 41 S. Ct. 371, 372 (1921); *Civil Rights Cases*, 109 U.S. 3, 25, 3 S. Ct. 18, 31 (1883). Acting under the statutory standards governing it (D. C. Code, Secs. 43-208, 43-301 (1940 ed.)) the Commission instituted its investigation into the effect of Transit broadcasting on the public convenience, comfort and safety. Its investigation was necessarily confined to those public questions (R. 28-29) by virtue of the statutory language under which it acted. After determining from all the evidence of record that there was no basis for applying the statutory standards either to prohibit or to limit transit radio, the Commission dismissed its investigation. Under these circumstances the rights of the Respondents on appeal were confined to the opportunity to establish that their interest coincided with the interests of the public. Cf. *National Broadcasting Co. v. United States*, 319 U.S. 190, 226-227, 63 S. Ct. 997, 1014 (1943). Thus the Commission's order neither denied any right, imposed any obligation, nor fixed any legal relationship of the Respondents. Its order neither commanded anyone to do anything nor to refrain from doing anything.

The determination of reasonable service requirements from the public's viewpoint is the function of the Commission. The exercise of this function involves the



reconciliation of conflicting interests of the individual members of the public which is essentially a legislative function. *Honolulu Rapid Transit and L. Co. v. Hawaii*, 211 U.S. 282, 29 S. Ct. 55 (1908); cf. *Montana-Dakota Co. v. Public Service Co.*, 341 U.S. 246, 250-252, 71 S. Ct. 692, 695 (1951). The Court of Appeals ignored the Commission's statutory functions and improperly erected the Constitution as a bar to the exercise thereof. It erred in attributing the acts of Transit to the Commission and, without further discussion, in finding a failure of due process. These unprecedented constitutional concepts were the basis for the Court's intrusion upon the legislative function.

## II

**The Court of Appeals Erred in Basing Its Decision Upon Constitutional Grounds Within the Fifth Amendment, Since Transit Broadcasts Are Not the Result of Governmental Action.**

The possible existence of a liberty under the First or Fifth Amendments such as a freedom not to listen does not of itself vindicate the lower court's decision. It must first be shown that this freedom was taken from the Respondents by the Government and without due process of law. If it was not the Government that deprived the Respondents of their freedom or liberty, that deprivation is not protected by the First or Fifth Amendment, as the lower court held it was. Also, if that freedom or liberty was limited by the Government, but in compliance with the requirements of substantive and procedural due process, the Respondents have again failed to establish the existence of any grievance for which they are entitled to redress.

The very statement of the Court of Appeals holding that "Transit's broadcasts deprive objecting passengers of liberty without due process of law" (R. 130) reveals one of the principal difficulties in reconciling the lower court's opinion with established legal doctrine. Objecting passengers are said to be denied their constitutional rights under the Fifth Amendment by the action of Transit, a private party. The guarantee against deprivation of liberty without due process in the Fifth Amendment is, of course, a limitation only upon the powers of the Government. *Talton v. Mayes*, 163 U. S. 376, 16 S. Ct. 986 (1896).

The Court of Appeals found, however, that sufficient governmental action existed to bring the instant case within the Fifth Amendment for the following reasons:

1. Transit has a "franchise" from Congress which gives it a virtual monopoly of public transportation in the District of Columbia; and

2. The District of Columbia Public Utilities Commission "sanctioned" the broadcasts in question when it investigated their use and determined that they are not inconsistent with the public convenience, comfort and safety.

The first of these reasons indicates that the lower court believed that there was governmental action be-

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<sup>3</sup> The court below referred to Section 4 of the Merger Act (D. C. Code, Sec. 44-201 (1940 ed.)) as preventing competition. This section, however, permits competition when the public interest requires it under a standard essentially the same as provided in the familiar provisions of the Interstate Commerce Act, which extend a broad discretionary authority to the Commission in permitting competition. See *United States v. Detroit & Cleveland Nav. Co.*, 326 U.S. 236, 66 S.Ct. 75 (1945). Another carrier is, in fact, presently authorized to do business in one area of the District (R. 39).

cause the acts of Transit itself constituted such action. The second suggests that the requisite governmental action is to be found in the act of the Public Utilities Commission in conducting an investigation with reference to Transit broadcasts. Both of these conclusions appear to be without support, not only in precedent but in logic. Both lead to an unparalleled extension of the applicability of many of the first ten amendments to the acts of Government-regulated private parties.<sup>4</sup>

**A. The acts of Transit itself do not constitute governmental action.**

Transit is a privately owned common carrier subject to regulation pursuant to statutory standards only to the extent that its operations involve the public interest. When it installed radio receivers in certain of its street-cars and buses it did so entirely on its own initiative. No Government agency sanctioned the institution of Transit broadcasts, nor did any statute make it necessary that such a sanction be obtained. The acts of Transit, insofar as they relate to broadcasting, are accordingly the lawful acts of a private person and nothing more. They rest on no authority which could characterize them as governmental action.

If Transit radio services do not constitute governmental action *per se*, the only other means of so characterizing them is by describing all the acts of Transit as governmental action. This is the necessary implication from the Court of Appeals' explanation that

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<sup>4</sup> Neither the Court of Appeals nor the Respondents have ever suggested that governmental action can be derived from the part played by Radio in maintaining Transit broadcasts and there appears to be no basis for such a contention. It is therefore not discussed in this brief.

"The forced listening imposed on Transit passengers results from government action" because "Streetcars and buses cannot operate in city streets without a franchise" (R. 127).

The consequences of such a view need hardly be elaborated. The same reasoning which finds governmental action in each act of Transit could also find it in each act of every other common carrier<sup>5</sup> subject to federal regulation, as well as in each act of every business subject to federal wire and radio regulation. Like Transit,<sup>6</sup> rail carriers,<sup>6</sup> motor carriers,<sup>7</sup> air carriers,<sup>8</sup> and persons engaged in communication by wire and radio<sup>9</sup> are regulated by the Federal Government with respect to the public convenience. Each of them operates under a license, certificate of necessity, or other form of governmental authority. The service rendered by each is Government-regulated in varying degrees, and each may be accorded a monopoly position by its regulating agency if that agency finds that the public interest so requires. If the acts of one of these regulated businesses constitute governmental action, so could the acts of all. In holding that constitutional issues are present in the instant case, therefore, the Court of Appeals in substance declared a new rule of law—a rule to the effect that Government-regulated private parties are government instrumentalities whose acts constitute governmental action.

The implications of such a ruling are so far-reaching that never before have any courts even appeared to give

<sup>5</sup> D.C. Code, Secs. 43-208, 43-301 (1940 ed.).

<sup>6</sup> 49 U.S.C., Secs. 1 (1) (a), 1 (5), 1 (18), 1 (20), 1 (21), 15 (3).

<sup>7</sup> 49 U.S.C., Secs. 301, 304, 306, 307, 216.

<sup>8</sup> 49 U.S.C., Secs. 401, 402, 481, 484.

<sup>9</sup> 47 U.S.C., Secs. 151, 201, 214.



serious consideration to them. In *American Communications Association v. Douds*, 339 U. S. 382, 70 S. Ct. 674 (1950), this Court, in fact, took pains expressly to avoid any inference that governmental regulation of itself can transform a private party—in that instance, a labor union—into a Government agency. Sufficient governmental action to raise constitutional issues was derived in that case from Congress' enactment of the Labor-Management Relations Act of 1947. Even while recognizing that the public interest in labor unions, clothed with powers comparable to those possessed by a legislative body is very great, however, the Court stated: "We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become government agencies or may be regulated as such." 339 U. S. at 402, 70 S. Ct. at 685.

Even more in point to the instant case is the decision of the United States Court of Appeals for the Third Circuit in *McIntire v. Wm. Penn Broadcasting Co. of Philadelphia*, 151 F. 2d 597 (3rd Cir. 1945), cert. den. 327 U. S. 779, 66 S. Ct. 530 (1946). There a radio station subject to governmental regulation under the Federal Communications Act was held to have the right to terminate its practice of selling radio time to religious organizations, despite a contention that its action operated as a limitation on liberties protected from governmental interference by the First Amendment. The court held that the station was not an instrumentality of the Federal Government, but a privately owned corporation, and that to adopt a contrary view "would be judicial legislation of the most obvious kind". 151 F. 2d at 601. In *Picking v. Pennsylvania R. Co.*, 151 F. 2d 240 (3rd Cir. 1945), the same court dismissed a complaint insofar as it alleged a deprivation of liberty without due process by the Pennsylvania Railroad. Again the reason

given for its action was simply that the railroad was not an agency of the state but a privately owned corporation. A similar result was reached without discussion of the point in *Lundberg v. Chicago Great Western Ry. Co.*, 76 F. Supp. 61 (W. D. Missouri 1948).

These few decisions appear to be the only ones which consider the possibility that governmental regulation may subject the acts of private parties to the limitations of the Bill of Rights. Only *American Communications Association v. Douds*, 339 U. S. 382, 70 S. Ct. 675 (1950), was cited in connection with the point by the court below, however, and then without discussion of the pertinent statement in that case quoted above. The Court of Appeals did not, in fact, rely directly on any authority for its holding on this issue. It referred only to precedents for the general statement that certain acts of private parties may be governmental in nature and therefore within the guarantees of the first ten amendments.<sup>10</sup> The acts of a privately owned company town<sup>11</sup>

<sup>10</sup> The cases cited by the Court of Appeals in this connection were: *American Communications Ass'n. v. Douds*, 339 U.S. 382, 401, 70 S.Ct. 674, 685 (1950); *Marsh v. Alabama*, 326 U.S. 501, 506, 66 S.Ct. 276, 278 (1946); *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757 (1944); *Civil Rights Cases*, 109 U.S. 3, 17, 3 S. Ct. 18, 25 (1883); and *Rice v. Elmore*, 165 F.2d 387, 389 (4th Cir. 1947). While the lower court quoted from the *Civil Rights Cases* opinion in support of this point, it failed to point out the necessary implication in that opinion that the acts of a railroad (a common carrier, like Transit) do not constitute governmental action sufficient to make applicable the Fourteenth Amendment, even though that railroad is subject to state regulation.

<sup>11</sup> *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276 (1946). It is worthy of comment that Mr. Justice Reed, joined by Mr. Chief Justice Stone and Mr. Justice Burton, expressed concern in his dissent to this opinion that the principle expressed therein might be extended beyond the facts of that case. 326 U.S. at 512-513.

or of political parties charged with the conduct of election primaries<sup>12</sup> are not comparable to the acts of Transit, however. This is true for the reason that the activities of Transit are not activities which are inherently governmental in nature. Neither the operation of a transportation system nor the broadcasting of radio programs is fundamentally a governmental function, however much Transit or Radio may be subject to governmental regulation in the performance of those functions. It cannot be said, therefore, that the nature of Transit's activities require that it be regarded as an agency of the Government, as the court below has implied.

There is some indication that the Court of Appeals intended to limit the effect of its ruling that the acts of Transit constitute governmental action by its statement that "Congress has given Transit not only a franchise but a virtual monopoly of the entire local business of mass transportation of passengers in the District of Columbia" (R. 127). The test of whether or not Transit has a monopoly grant is hardly an appropriate one to use in determining the private or governmental character of Transit's acts, however.<sup>13</sup> Applying such a criterion, it could happen that the broadcasting activities of Transit would be termed governmental in character today and that those acts would be adjudicated as improper because encroaching on rights protected by the

<sup>12</sup> *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 707 (1944); *Rice v. Elmore*, 165 F. 2d 387 (4th Cir. 1947).

<sup>13</sup> As already noted in footnote 3, the applicable statute (D.C. Code, Sec. 44-201 (1940 ed.)) does not exclude the possibility that a rival transportation company can be licensed to compete with Transit, whenever the public interest so requires. Another carrier is, in fact, presently authorized to do business in one area of the District (R. 39).

Fifth Amendment. Tomorrow, however, if the Commission determined that the public interest dictated the granting of a "franchise" to additional competing transportation companies, the acts of both Transit and its new rivals would be termed private, and the broadcasting that is today banned as unconstitutional would become permissible. Such a distinction has no apparent basis in logic and serves only to confuse the issues involved. A ruling that competing transit companies in one city are to be judged by different standards than are applied to a transit company without competition in another city, for example, could raise serious questions under the equal protection clause of the Fourteenth Amendment.

It is therefore both illogical and impractical to say that a grant of a "monopoly franchise" to a privately-owned Government-regulated business must render that business an instrumentality of Government. It would be equally fallacious to reason that the acts of a private enterprise constitute governmental action because the enterprise is to some degree regulated by Government. One can only conclude, therefore, that its operation subject to governmental regulation in certain respects does not make Transit a governmental instrumentality whose acts are subject to the requirements of the Fifth Amendment.

**B. The investigation by the Public Utilities Commission of Transit's radio programs did not constitute those activities governmental action.**

The Court of Appeals also held that Transit's radio programs constitute governmental action sufficient to raise questions under the Fifth Amendment because of the Commission's investigation of the public aspects



of that broadcasting and its subsequent determination that such broadcasting is not inconsistent with the public convenience, comfort and safety. This conclusion does not bear analysis.

The lower court reasoned that Transit broadcasting "has been sanctioned by the governmental action of the Commission. If the Commission had found it contrary to public comfort or convenience, or unreasonable, it would have stopped . . ." (R. 127).

The Court of Appeals erred, in so holding that the Commission necessarily adopted as its own action the broadcasting practices of a private party which it did not forbid. The Commission's ruling in this matter was not compulsive in character. It did not order or forbid Transit broadcasting. In effect it said no more than that the Commission had no authority to prohibit Transit broadcasts since the evidence clearly showed that such broadcasts are not inconsistent with the public convenience, comfort and safety. The failure of the Commission to prohibit Transit broadcasting can be attributed, therefore, to the failure of Congress to require such a prohibition. No governmental action resulted when the Commission refused to act any more than when Congress refuses to enact requested legislation. The rights or duties of Transit with respect to the furnishing of radio programs in its streetcars and buses were neither greater nor smaller after the Commission dismissed its investigation than they were before that investigation was undertaken.

In holding that the act of the Commission in investigating Transit's radio service constituted governmental action, the lower court in effect ruled that resort to the Commission by the Respondents as intervenors in the Commission's investigation, of itself, created a new right entitling the Respondents to their desired remedy.

When the Respondents appeared before the Commission, they argued that Transit broadcasts deprived them of constitutional rights under the First and Fifth Amendments. This claim was defective because the acts complained of were those of private parties (Transit and Radio) and so were not reached by these Amendments. It was also defective because the rights asserted by the intervening Respondents were private rights not within the scope of the questions raised by the Commission's statutory notice of investigation into public questions. It is now contended, however, that the failure of the Commission to prohibit the acts complained of resulted in such an adoption of those acts by a Government agency as to constitute them governmental action. Out of this circuitous reasoning the Respondents derive their claim that the action of the Public Utilities Commission "sanctioned" Transit's radio programs and so brought them within the guarantees of the Bill of Rights. The inevitable effect of such logic, if accepted, would be to extend the guarantees of many of the first ten Amendments to all parties who seek relief from a Government agency, whether those parties arrive at the agency doors already clothed with such rights or not.<sup>14</sup>

The Fifth Amendment forbids the Federal Government from depriving any person of liberty without due process of law. It does not require the Government to act wherever one private party may be infringing upon

<sup>14</sup> The Respondents' argument that their intervention in the Commission's investigation clothed their grievance against Transit and Radio with constitutional overtones is somewhat analogous to the equally fallacious argument that an intervenor in a proceeding can enlarge or alter the issues involved in the proceeding. Cf. *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498, 64 S.Ct. 731, 735 (1944).

the liberty of another. It was precisely for this reason that in *United States v. Cruikshank*, 92 U.S. 542, 23 L. Ed. 588 (1876), this Court refused to uphold the conviction of a private party who had been accused of abusing another's right under the Second Amendment to bear arms. The Court there stated:

"The second amendment declares that it [the right to bear arms] shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government. . . ." (92 U.S. at 553, 23 L. Ed. at 591-592)

In reaching its conclusion on the evidence of record that its investigation should be dismissed, the Commission did not sanction the invasion of a constitutional right by Transit any more than this Court sanctioned Cruikshank's invasion of another's right to bear arms by refusing to affirm Cruikshank's conviction under the Second Amendment. *United States v. Cruikshank*, 92 U.S. 542, 23 L. Ed. 588 (1876). As in the case of Cruikshank, Transit's acts are the acts of a private party and are not subject to the restrictions of the Bill of Rights. Transit has not sought (nor does it require) any action by the Commission in aid of its radio programs. Its exercise of the right to have radio programs on its vehicles is not dependent upon any sanction from the Commission or any other Government instrumentality. Cf. *Shelley v. Kraemer*, 334 U.S. 1, 13-14, 68 S. Ct. 836, 842 (1948).

In summary, the lower court's holding that there was sufficient governmental action present in the instant case to justify a consideration of constitutional ques-

tions under the Fifth Amendment was entirely unwarranted. The conduct of neither Transit nor the Commission supports such a conclusion, and if the Government does not act through either one of these organizations separately it cannot be said to act through both together. The Court of Appeals ruling that Transit's radio programs are supported by governmental action is therefore in error.

Since Transit broadcasting does not infringe any constitutional rights of the Respondents, and since that broadcasting has with good reason been found by the Public Utilities Commission not to be inconsistent with the public convenience, comfort and safety, the proper recourse for the Respondents in alleviating any grievance they may believe they suffer because of it lies not with the courts but with Congress. The Respondents have always had a right to seek enactment of legislation limiting or prohibiting broadcasting in public conveyances in the District of Columbia.<sup>15</sup> Their failure to secure such legislation would mean only that in this matter they are among a minority who must accept the existing situation resulting from their acquiescence in the will of the majority. This is true at some time of every person enjoying the privileges of democratic government.

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<sup>15</sup> Any such statutory enactment would, of course, be subject to such constitutional limitations as might be applicable.



## III

**The Court of Appeals Erred in Holding That Any Liberty of the Respondents Affected by Transit Broadcasting Was Taken Without Due Process of Law.<sup>16</sup>**

The function of constitutional government is not so much the unqualified protection of the individual's liberty to do as he pleases as it is a reasonable reconciliation of the inevitable conflicts which must arise among individuals in the exercise of their liberty. No two persons have identical likes and dislikes, and the satisfaction of one person's desires must frequently mean the obstruction of another's. It is a rare occasion indeed when an Act of Congress, an order of an administrative agency, or a judgment of a court does not restrict the liberty of some in fostering other interests considered more important to the general welfare. Not even the fundamental freedoms protected by the Bill of Rights are absolute (*Kovacs v. Cooper*, 336 U.S. 77, 69 S. Ct. 448 (1949)), and the value of each one of those freedoms in a given set of circumstances must be weighed against the value of other freedoms with which they conflict.

The Fifth Amendment guarantee of liberty as well as the guarantee under the First Amendment, therefore, are necessarily qualified ones. The Fifth Amendment does not state that no man shall be deprived of his liberty, but rather that no man shall be deprived of his liberty without due process of law. Due process "demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall

<sup>16</sup> Throughout this Point the Petitioners assume *arguendo* that the facts of the instant case establish sufficient governmental action to justify further consideration of the applicability of the Bill of Rights. See Point II of this brief to the contrary.

have a real and substantial relation to the object sought to be obtained." *Nebbia v. New York*, 291 U.S. 502, 525, 54 S. Ct. 505, 510-511 (1934). So long as competing interests are adjusted and limited in accordance with the requirements of due process, the guarantee of the Fifth Amendment has been satisfied.

In the instant case, if there were any limitation placed upon the Respondents' liberty by the Government in favor of Transit broadcasting, it resulted from a careful assessment of the public interests involved within the framework of the Commission's statutory powers. That assessment was made in full compliance with the requirements of due process. The court below erred, therefore, in holding that the Respondents have been deprived of liberty without due process of law.

**A. The Court of Appeals failed to recognize the presence of competing interests in the instant case which are opposed to such interests as the Respondents may assert.**

The precise reasoning behind the Court of Appeals' determination that there is a freedom not to listen which deserves protection in the instant case is not apparent. The court's opinion indicates that this interest must prevail because there are no competing interests involved. It seems clear, however, that such is not the case. Wherever the Respondents can assert a freedom not to listen to Transit broadcasts, there is surely, at the least, a corresponding affirmative freedom to listen to such broadcasts which can be asserted by the far greater number of Transit passengers who enjoy those broadcasts.<sup>17</sup> The latter freedom is con-

<sup>17</sup> Two surveys in which trained investigators used recognized scientific random sampling methods were made to test public

cerned with the liberty to use one's faculties as he desires fully as much as is the former. Furthermore, the freedom to listen, unlike any freedom not to listen, is a necessary element of the freedom to communicate and so is protected by the First Amendment guarantees of free speech and a free press. *Cf. Martin v. City of Struthers*, 319 U.S. 141, 143, 63 S. Ct. 862, 863 (1943). The court below failed even to discuss the freedom to listen, however, when it held that its newly-recognized freedom not to listen must prevail under the facts of the instant case.

There are other interests at stake in the instant case which the Court of Appeals also did not consider. There is, for example, a very considerable interest of Transit under the Fifth Amendment in not being deprived of the liberty to use its property and to contract in accordance with the best judgment of its management, subject to such public limitations as may be imposed upon it by statute. Perhaps the most disturbing instance of the lower court's failure to recognize the presence of competing interests, however, is its apparent holding that Transit and Radio can assert no First Amendment interest in freedom of speech and press in opposition to the claims of the Respondents. There seems to be no doubt that radio is entitled to the protection of that

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reaction to Transit broadcasting. The second of these was made after consultation with the Public Utilities Commission. It disclosed that more than 75% of the Transit-riding public favored Transit broadcasts (R. 70), while approximately 6.6% opposed such broadcasts (although only 3% stated they would oppose the majority will on the matter) (R. 71). These results are similar to those obtained from the first survey, which was conducted before the Commission instituted its investigation (R. 66, 69). They also resemble the samplings taken in other cities in the country on the same subject (R. 41-42).

Amendment,<sup>18</sup> especially where it is performing the important function of broadcasting information in the nature of factual news reports. Furthermore, this protection extends even to speech aimed not necessarily at the distribution of information but rather at entertainment, *Winters v. New York*, 333 U.S. 507, 510, 68 S. Ct. 665, 667 (1947), and in many instances it extends to material used in business or economic activity, *Thomas v. Collins*, 323 U.S. 516, 531, 65 S. Ct. 315, 323 (1945). Once such an interest in freedom of speech and press has been established, only the existence of a substantial, serious evil resulting from its exercise will normally justify a restriction upon it. *Bridges v. California*, 314 U.S. 252, 262-263, 62 S. Ct. 190, 193-194 (1941).

The Court of Appeals dismissed the contention that there are First Amendment freedoms of the Petitioners in conflict with the Respondents' interests in the instant case. It held that "the public interest in freedom from forced listening outweighs the private interest in making more effective, by amplifying a communication not protected by the First Amendment. The Amendment does not protect commercial advertising [citing *Valentine v. Chrestensen*, 316 U.S. 52, 62 S. Ct. 920 (1942).]" (R. 129). The *Valentine* decision did no more, however, than uphold as constitutional a statute of New York State in which the distribution of commercial and business advertising matter on public thoroughfares was forbidden. It was apparent from the facts of the case that there was no *bona fide* attempt by the advertiser to distribute non-commercial information and the Court took care to stress this point in its opinion. 346 U.S. at 55, 62 S. Ct. at 921-922. The decision is there-

<sup>18</sup> Cf. *United States v. Paramount Pictures*, 334 U.S. 131, 166, 68 S.Ct. 915, 933 (1948).



fore inapplicable to the instant case, where not only the right to broadcast advertisements but the right to broadcast news reports, weather forecasts, and other non-commercial public service announcements is in issue.<sup>19</sup> Furthermore, the scope of the *Valentine* decision has since been clarified by this Court's ruling in *Jamison v. Texas*, 318 U.S. 413, 63 S. Ct. 669 (1943), that the mere presence of advertising matter on a handbill containing other matter as well cannot subject distribution of the handbill to prohibition.

It therefore appears that the true statement of the law is not that the First Amendment does not protect commercial advertising, as the Court of Appeals concluded, but that a legislature may in the exercise of its legitimate police power limit the distribution of any communication containing no *bona fide* message other than advertising. There is no such statute applicable in the instant case, and the content of the broadcasts in issue cannot in any event be described as of a predominantly commercial nature. The advertising messages in Radio's broadcast schedule occupy no more than six minutes per hour of broadcast time. They are a necessary adjunct of the broadcasting of music, news reports, and weather forecasts and other public service announcements, for they provide the revenue necessary to support those additional activities. The need for

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<sup>19</sup> The court refrained from ruling "whether occasional broadcasts of music alone would infringe constitutional rights" (R. 130), although the original appeal from the order of the Public Utilities Commission to the District Court complained in general terms of Transit's broadcasts. It should be noted, however, that the lower court's decision acts as a bar to non-commercial announcements and even to broadcasts of music alone as a practical matter, since the radio advertising banned by the court provides the revenue necessary to support such broadcasts.

radio and newspaper advertising to support their respective media has long been recognized. Where governmental action has the effect of restricting means of communication by affecting advertising revenues grave constitutional questions are raised by that action. Cf. *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S. Ct. 444 (1936). A prohibition of Transit radio advertising by the Commission would raise such questions in the instant case:

It is not true, therefore, that there were no constitutional interests in issue before the court below which could prove more deserving of protection than the newly recognized Fifth Amendment freedom not to listen upon which the court predicated its decision. At least on a par with that freedom is the freedom to listen which can be asserted by those passengers who enjoy Transit broadcasts, a freedom which is grounded on the First as well as the Fifth Amendment. There is also on Transit's part a liberty under the Fifth Amendment to improve its service with radio programs and to use its property according to its own best judgment, subject always to requirements of the public interest as defined by statute. Finally, on the part of Transit and Radio together there is the additional First Amendment freedom to inform and entertain Transit patrons by means of broadcasts in the public interest.

**B. The interest of the public in the instant case was properly resolved by the Commission according to applicable legislative standards and in compliance with due process of law and the Court of Appeals committed error in substituting its judgment for that of the Commission.**

Whenever a circumstance arises in which two or more liberties come in conflict with one another, the task of

resolving that conflict rests fundamentally with the legislature and not with the courts. Mr. Justice Frankfurter aptly stated both the problem and the necessary answer to it in his concurring opinion in *Dennis v. United States*, 341 U.S. 494, 71 S. Ct. 857 (1951):

“But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. . . . History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

“Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. . . . We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it.” 341 U. S. at 525, 71 S. Ct. at 875.

This conclusion is one to which the Court has adhered throughout the numerous civil rights cases in recent years. E.g., *Thomas v. Collins*, 323 U.S. 516, 531, 65 S. Ct. 315, 323 (1945); *Valentine v. Chrestensen*, 316 U.S. 52, 54, 62 S. Ct. 920, 921 (1942).

In the instant case, the legislative judgment as to the best interest of the public is reflected ultimately in the action of the Public Utilities Commission in dismissing its investigation of Transit broadcasting. That

investigation was made pursuant to statutory provisions which assured the Respondents as members of the public of both substantive and procedural due process. Congress has directed the Commission to insure that Transit provides service in the public convenience, comfort and safety. D.C. Code, Secs. 43-208, 43-301 (1940 ed.). It has also prescribed the manner in which the Commission may exercise this authority. D.C. Code, Secs. 43-408 to 43-411 (1940 ed.). It was pursuant to these statutes that the Commission acted in the instant case. No contention has ever been made that the applicable statutory provisions are unconstitutional, and an examination of the Commission's conduct in the instant case demonstrates its full compliance with such provisions. A formal investigation was held on the Commission's own motion relating to the public convenience, comfort and safety of Transit broadcasting, and the requisite statutory notice of this investigation, together with an opportunity to present evidence and testimony was afforded all interested parties. Only one of the Respondents testified. In all only two users of Transit service testified as to their objection to the radio broadcasts.

It is apparent from the foregoing that the Respondents were not deprived of any liberty by the Commission without due process. The public convenience, comfort and safety is an entirely reasonable standard by which to determine which of two or more conflicting interests should prevail, and the Commission afforded the Respondents a complete and impartial hearing in applying that standard.

Without challenging either the statute under which the Commission acted or the sufficiency of the evidence supporting the Commission's order dismissing its investigation of Transit broadcasting, the Court of Ap-



peals nevertheless reversed that order. In doing this it employed the following reasoning:

“In our opinion Transit’s broadcasts deprive objecting passengers of liberty without due process of law. Service that violates constitutional rights is not reasonable service. It follows that the Commission erred as a matter of law in finding that Transit’s broadcasts are not inconsistent with public convenience, in failing to find that they are unreasonable, and in failing to stop them.” (R. 130).

Such an argument begs the very issue the court undertook to decide.

There can be a failure of due process only if the legislative restriction of a liberty is arbitrary or unreasonable. *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586, 62 S. Ct. 736, 743 (1942); cf. *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S. Ct. 997 (1943). It therefore serves no purpose to say as the court did that the legislative restriction of a liberty is unreasonable because there was a failure of due process.

The Respondents did not appear before the court below armed with any constitutional right, contrary to the court’s assumption. As the court itself recognized in its opinion (R. 129), the freedom not to listen is not absolute. It conceivably can be restricted in favor of conflicting constitutional interests if due process of law is observed in imposing that restriction. The question before the court below, therefore, was not only whether the Respondent’s freedom had been restricted, but whether the alleged restriction had been imposed in accordance with due process. This latter question the court did not answer. If there is a freedom not to listen which was restricted in this case, as a matter of

law that restriction was imposed in accordance with due process. It was made according to a reasonable standard prescribed by Congress and with careful observance of all claims of the Respondents to procedural due process.

The Court of Appeals has ruled in effect that Respondents' alleged freedom not to listen cannot be limited even by due process. It has not merely said that Congress may, in the exercise of its police power, favor the freedom not to listen over other freedoms. Cf. *Saia v. New York*, 334 U.S. 558, 68 S. Ct. 1148 (1948); *Thomas v. Collins*, 323 U.S. 516, 65 S. Ct. 315 (1945); *Valentine v. Chrestensen*, 316 U.S. 52, 62 S. Ct. 920 (1942). No such police power has ever been exercised. The court's actual ruling is that Congress and the Public Utilities Commission *must* restrict other constitutional interests and the public interest in favor of the freedom not to listen. While it may have rejected the principle in so many words, therefore, the court below has come remarkably close to holding that there is such a thing as an absolute right—a right on the part of an individual to keep others from talking in public places.

This distinction between what Congress may do in the legitimate exercise of its police power over the District of Columbia, and what Congress must do as a matter of constitutional law seems not to have occurred to the lower court. It stated, for instance, that "Both the decision and the opinions in *Kovacs v. Cooper*, 336 U.S. 77, give great weight to the public interest in freedom from forced listening" (R. 128). However, the Court held in that case only that a city may enact an ordinance forbidding the use of loud and raucous sound trucks on city thoroughfares. There is no implication in the opinion that a city must forbid the use of

such trucks. It does not, therefore, justify any conclusion that the Public Utilities Commission must ban Transit's broadcasts in the absence of any legislative act requiring such a prohibition. The dangers of restricting civil liberties without proper statutory safeguards—indeed, without benefit of any statute at all—have long been recognized by the courts and do not require further elaboration here. Cf. *Niemotko v. Maryland*, 340 U. S. 268, 71 S. Ct. 325 (1951); *Kunz v. New York*, 340 U.S. 290, 71 S. Ct. 312 (1951); *Saia v. New York*, 334 U.S. 558, 68 S. Ct. 1148 (1948).

The lower court nevertheless failed to recognize this need for legislative guidance in adjusting competing interests. Instead of regarding the Bill of Rights as a limitation on governmental interference with civil liberties, it has, in effect, interpreted the Fifth Amendment as a mandate on Government to restrict those liberties whenever their exercise becomes the least bit annoying. The court has done this by creating a negative freedom—a freedom not to listen. This amounts to little less than a freedom not to be bothered. Such a freedom, the Court of Appeals has ruled, prevails even over the vital First Amendment freedoms which until now have repeatedly been recognized as occupying a preferred position in the balancing of constitutional interests. *Saia v. New York*, 334 U.S. 558, 562, 68 S. Ct. 1148, 1151 (1948); *Marsh v. Alabama*, 326 U.S. 501, 509, 66 S. Ct. 276, 280 (1946); *Thomas v. Collins*, 323 U.S. 516, 529-530, 65 S. Ct. 315, 322 (1945).

As it has been interpreted by the Court of Appeals, therefore, the freedom not to listen has in it the seed of destruction for a great many of our established civil liberties. The Court of Appeals held that since the individual needs to use streetcars and buses he cannot be exposed to broadcasts (however reasonable) while satis-

ifying that need. By the same token, it would seem that the individual exercising his right to enjoy a public park or the privacy of his home could also insist on this right to silence (assuming that the activity which he finds annoying is in some measure supported by governmental action). The politician with a Government permit to speak in the park and the evangelist with a Government license to solicit from door to door could therefore no longer "bother" the unwilling listener, however reasonable their activities might be.<sup>20</sup> Furthermore, the Court of Appeals has held that the remedy of such a dissenting listener is not dependent upon any statute but is available by simple resort to judicial process. The result of the court's decision, therefore, is to place in the hands of a dissident individual a veto power which could seriously threaten the free exercise of even the most precious of our civil liberties. It has given to the minority an almost uncontrolled discretion to sacrifice the welfare of the public to its own imagined comfort and convenience. It is not the private convenience of the few with which Congress, the Commission, and the courts must concern themselves, but the greater convenience of the public as a whole.

The Court of Appeals therefore committed error in ruling that the newly announced freedom not to listen

<sup>20</sup> If it is objected that the issuance of a Government permit to speak in a park or a Government license to solicit from door to door (in the District of Columbia) does not constitute sufficient governmental action to raise constitutional questions under the First and Fifth Amendments, it should also be noted that not even this much support for a finding of governmental action is present in the instant case. Transit's broadcasting program has been carried on without the need for or the issuance of any Government permit authorizing such a program. See Point II of this brief.



must prevail over the very considerable competing constitutional rights and the interest of the public which are also present in the instant case. The order of the Commission which the court below reversed should have been affirmed because it was reached in compliance with the requirements of procedural due process and in accordance with a reasonable standard prescribed by Congress. That order was neither unreasonable nor arbitrary. Its reversal by the Court of Appeals therefore constituted judicial legislation beyond the scope of the court's authority.

#### IV

#### **The Court of Appeals Erred in Reversing the Commission's Order of Dismissal on the Basis of Evidence Not of Record Before the Commission or Not Certified to the Court.**

While the Court of Appeals did not hold that the Commission's findings of fact are not supported by substantial evidence of record, its opinion nevertheless relies heavily on the emotional overtones inherent in this case by reference to and assumptions based on matters outside the record which reflect on the validity of the Commission's findings. In referring to such material the court not only exceeded its power of review over orders of the Commission but also made several mistakes of fact.

Section 43-705 of the District of Columbia Code (1940 ed.) provides for review of orders of the Commission by the District Court and thereafter by the Court of Appeals and the Supreme Court. The section specifically requires that any such appeal to the District Court "shall be heard upon the record before the Commission, and no new additional evidence shall be re-

ceived by the said court." Such a statute precludes review and reversal of a Commission order on the basis of allegations in a Petition of Appeal not supported by the record. The reliance by the Court of Appeals on such allegations, as well as on supposed admissions by Radio and Transit (R. 126), constitutes a violation of Section 43-705.

In Section 43-706 of the Code it is provided that an appeal from a Commission order shall be limited to questions of law and that "the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary, or capricious." There is no reason to believe that these limitations on the scope of review are not equally as binding on the Court of Appeals as on the District Court.

Despite these limitations, however, the Court of Appeals went outside the record in the following instances:

1. In challenging (without overruling) the Commission's finding that Transit's broadcasts are favored by a great majority of its passengers, the court referred to an unofficial ballot poll on the subject conducted by a newspaper (R. 130). This poll was described by the court as an "unbiased inquiry which did not claim to be scientific." It was not a poll, however, that was ever presented to the Commission prior to issuance of the order dismissing the Commission's investigation, nor was it ever admitted in evidence by that body. It should not, therefore, have been considered by the Court of Appeals.

The poll is without validity in any event, since its results were controlled only by the capacity of a few persons to purchase newspapers containing the printed ballots with which they voted. Those results are, there-

fore, no more unbiased than they are scientific. The lower court chose to give some prominence to this poll, in its opinion, however, in spite of very substantial uncontradicted evidence in the record to the effect that the public as a whole does favor the radio service provided by Transit in its streetcars and buses (R. 35, 38, 41, 42, 69-71).

2. As a basic premise the lower court also stated that "forced listening" was "well known" and "proved by many witnesses" (R. 126), and that "the record makes it plain that the loss [of freedom of attention] is a serious injury to many passengers." (R. 129) The Petitioners do not know of any evidence of record, however, either before the Commission or before the Court of Appeals, which supports such conclusions. Only two Transit rider witnesses testified against Transit's radio programs during the Commission's investigation (Transcript of original record before the Commission, pp. 488, 495). One of these witnesses denied the premise of "forced listening", and neither of them spoke of any injury occasioned by such programs. Both testified only to a dislike of Transit broadcasting. This testimony can be contrasted with the evidence before the Commission (R. 91-93) and with the Commission's finding (R. 119-120) indicating that there is no such thing as an "unavertible sense of hearing." It can be contrasted also with the evidence before the Commission (R. 69-71) and with the Commission's finding (R. 119) to the effect that a great majority of Transit's passengers favor radio service in buses and streetcars.

3. The lower court in footnotes 3 and 5 of its decision (R. 126) referred to matters from an affidavit attached to the Respondents' supplementary application to the Commission for reconsideration. This affidavit should

not have been considered by the court, since it was never admitted in evidence by the Commission. The Respondents had ample opportunity to present ~~any~~ such evidence that may have been relevant at the original hearing before the Commission. They chose not to do so but withheld their offers until their application for reconsideration. Under such circumstances, the consideration of such affidavits deprived the other parties before the Commission of any opportunity for cross-examination or rebuttal thereon and the denial of reconsideration by the Commission was not arbitrary. Cf. *St. Josephs Stockyards Co. v. United States*, 298 U.S. 38, 53-54, 56 S. Ct. 720, 726-727 (1936); *United States v. Northern Pacific Ry. Co.*, 288 U.S. 490, 494, 53 S. Ct. 406, 407 (1933); *Manufacturer's Ry. Co. v. United States*, 246 U.S. 457, 489-490, 38 S. Ct. 383, 392 (1918).

4. On still another occasion, a reference by the Court of Appeals to matters outside the record certified to it, led the Court to make a statement which is contrary to fact. The Court quoted the Chairman of the Commission as observing that "The decision of the Commission will be made on the numbers of those saying 'I like it' and those saying 'I dislike it' " (R. 129, footnote 15). This quotation implies that the Commission determined that Transit's radio programs are in the public interest on the basis of a majority vote rather than on the basis of evidence before it. It is apparently derived from page 336 of the transcript of the original record before the Commission, a page which was not certified to the Court of Appeals.<sup>21</sup>

<sup>21</sup> The consideration of matters not certified to the Court of Appeals by the District Court violates Rule 75(g) of the Federal Rules of Civil Procedure. A Court of Appeals can act only on the facts officially appearing before it and cannot take judicial



The error of the Court in its reliance on matters not included in the record is emphasized by its failure to state that matter accurately. The Court failed to note that the original text of the quotation had been officially corrected by the Commission. It properly should read:

“Chairman Flanagan: The decision of the Commission *will not* be made on the number of those saying ‘I like it’ and those saying ‘I dislike it.’ ”  
(Emphasis supplied.)

In going outside the record certified to it, therefore, the Court of Appeals attributed to the Chairman of the Commission an intent contrary to his actual statement. The inference which the Court apparently drew from that quotation is accordingly unwarranted.

For the reasons above stated, therefore, the Court of Appeals committed error in reviewing and vacating the Commission's order on the basis of material not appearing in the record before the Commission. Since it must be presumed that the Court used this material for a definite purpose in explaining the rationale of its decision, it cannot be presumed that its error in this regard is without significance.

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notice of the records of subordinate Courts within its jurisdiction. *White v. Central Dispensary and Emergency Hospital*, 69 App. D.C. 122, 99 F.2d 355 (1938); *Divide Cr. Irr. District v. Hollingsworth*, 72 F.2d 859 (10th Cir. 1934).

**The Order of the Commission Dismissing Its Investigation of Transit Broadcasting Does Not Infringe Unconstitutionally Upon Any Interest Which the Respondents May Assert Under the First Amendment.**

The court below held only that Transit broadcasting is in contravention of rights of the Respondents existing under the Fifth Amendment. The Respondents argued before that court, however, that they were also entitled to protection against Transit broadcasting because it infringed upon interests which they asserted under the First Amendment. This claim is being presented to this Court in a cross-petition (No. 295) in the instant case. Although the Petitioners may find it necessary to answer this argument more fully in an answer brief to the cross-petition, they include in this brief for the convenience of the Court the following outline with respect to their position regarding the Respondents' claims under the First Amendment.

The basic premise of the Respondents with respect to their claims under the First Amendment has been that Transit broadcasting violates their freedom of speech. The Respondents argue that freedom to speak means a freedom to listen and that a freedom to listen implies a freedom not to listen.

The Petitioners challenge this argument on several grounds:

(1) Since the Commission's order dismissing its investigation determined only that Transit broadcasting is not inconsistent with the public convenience, comfort and safety, the only standards under which the Commission is authorized to regulate Transit, its order did not invade any private rights of the Respondents. (For the substance of this argument, the Court is re-

spectfully referred to the argument made by the Petitioners in Point I of the instant brief.)

(2) Freedom of speech as used in the First Amendment is actually a freedom to communicate. For this reason it includes a freedom to listen as well as a freedom to speak. Cf. *Martin v. City of Struthers*, 319 U. S. 141, 143, 63 S. Ct. 862, 863 (1943). The freedom to communicate is not dependent in any manner, however, upon a freedom not to listen, a freedom which if it existed would serve very effectively to negate all the rights arising out of the freedom to communicate. A freedom not to listen cannot therefore logically be derived from the First Amendment freedom to communicate (or, more properly, freedom of speech).

(3) The facts of the instant case do not establish sufficient governmental action to support the Respondents' contention that any of their interests under the First Amendment are affected by Transit broadcasting. (For the substance of this argument, the Court is respectfully referred to the argument made by the Petitioners in Point II of the instant brief, to the effect that the facts of the instant case do not present sufficient governmental action to support application of the Fifth Amendment to them.)

(4) If any First Amendment freedoms of the Respondents were limited by the order of the Commission dismissing its investigation of Transit broadcasting, those freedoms were limited in accordance with due process of law. Not even First Amendment freedoms are absolute in character, *Dennis v. United States*, 341 U. S. 494, 503, 71 S. Ct. 857, 864 (1950); *Kovacs v. Cooper*, 336 U. S. 77, 85, 69 S. Ct. 448, 453 (1949), and

the Commission properly found after an investigation that competing interests were more deserving of protection in the instant case than those of the Respondents. This was particularly proper when the recognition of the Respondents' freedom not to listen would restrict not only Fifth Amendment liberties of others but would also infringe upon the First Amendment freedom to communicate. That investigation was conducted in accordance with the requirements of procedural due process and the findings resulting from it were made in accordance with a reasonable standard prescribed by Congress—the public convenience, comfort and safety. It was error for the Court of Appeals to reverse an order of the Commission lawfully made in compliance with this legislative standard. (For a more detailed exposition of this argument the Court is respectfully referred to Point III of the instant brief, in which the Petitioners have contended that the Respondents were not deprived of liberty without due process under the Fifth Amendment by Transit broadcasting.)



**CONCLUSION.**

The decision of the court below is, for the reasons shown above, erroneous and should be reversed.

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**APPENDIX.****Federal Constitution.****Amendment I.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Amendment V.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**STATUTES.****D. C. CODE (1940 ed.):**

**Sec. 43-208. Orders as to repairs—Improvement in equipment, service.**

Whenever the commission shall be of opinion, after hearing had upon its own motion or upon complaint, that repairs, improvements, or changes in any street railroad, gas plant, electric plant, telephone line, telegraph line, pipe line, water-power plant, or the facilities of any common carrier ought reasonably to be made,

or that any addition of service or equipment ought reasonably to be made thereto, or that the vehicles or cars of any street railroad or common carrier are unclean, insanitary, uncomfortable, inconvenient, or improperly equipped, operated, or maintained, or are in need of paint, or unsightly in appearance, or that any addition ought reasonably to be made thereto, in order to promote the comfort or convenience of the public or employees, or in order to secure adequate service or facilities, the commission shall have power to make and serve an order directing that such repairs, improvements, changes, or additions to service or equipment be made within a reasonable time and in a manner to be specified therein, and every such public utility is hereby required and directed to obey every such order of the commission. (Mar. 4, 1913, 37 Stat. 995, Ch. 150, Sec. 8, par. 96.)

**Sec. 43-301. Public utilities—Service and facilities—  
Charges to be reasonable, just, and nondiscriminatory  
—To obey orders of commission.**

Every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facilities or services furnished, or rendered, or to be furnished or rendered, shall be reasonable, just, and non-discriminatory. Every unjust or unreasonable or discriminatory charge for such facility or service is prohibited and is hereby declared unlawful. Every public utility is hereby required to obey the lawful orders of the commission created by chapters 1-10 of this title. (Mar. 4, 1913, 37 Stat. 977, ch. 150, Sec. 8, par. 2.)

**Sec. 43-408. Commission may investigate unjust, discriminatory rates—No order to be entered without formal hearing.**

Upon its own initiative or upon reasonable complaint made against any public utility that any of the rates, tolls, charges, or schedules, or services, or time and conditions of payment, or any joint rate or rates, schedules, or services, are in any respect unreasonable or unjustly discriminatory, or that any time schedule, regulation, or act whatsoever affecting or relating to the conduct of any street railway or common carrier, or the production, transmission, delivery, or furnishing of heat, light, water, or power, or any service in connection therewith, or the conveyance of any telegraph or telephone message, or any service in connection therewith, is in any respect unreasonable, insufficient, or unjustly discriminatory, or that any service is inadequate or can not be obtained, the commission may, in its discretion, proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, or act complained of shall be entered by the commission without a formal hearing. (Mar. 4, 1913, 37 Stat. 983, ch. 150, Sec. 8, par. 38.)

**Sec. 43-409. Commission to notify utility of complaints.**

The commission shall prior to such formal hearing notify the public utility complained of that a complaint has been made, and ten days after such notice has been given the commission may proceed to set a time and place for a hearing and an investigation as hereinafter provided. (Mar. 4, 1913, 37 Stat. 983, ch. 150, Sec. 8, par. 39.)



**Sec. 43-410. Notice as to hearings—Compulsory attendance of witnesses.**

The commission shall give the public utility and the complainant, if any, ten days' notice of the time and place when and where such hearing and investigation will be held and such matters considered and determined. Both the public utility and complainant shall be entitled to be heard and shall have process to enforce the attendance of witnesses. (Mar. 4, 1913, 37 Stat. 983, ch. 150, Sec. 8, par. 40.)

**Sec. 43-411. Reasonable rates may be ordered—Notice to be given utility affected thereby.**

If upon such investigation the rates, tolls, charges, schedules, or joint rates shall be found to be unjust, unreasonable, insufficient, or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of chapters 1-10 of this title, the commission shall have power to determine and by order fix and order to be substituted therefor such rate or rates, tolls, charges, or schedules as shall be just and reasonable. \* \* \*. (Mar. 4, 1913, 37 Stat. 983, ch. 150, Sec. 8, par. 41.)

**Section 43-415. Hearings after summary investigation.**

If after making such investigation the commission becomes satisfied that sufficient grounds exist to warrant a formal hearing being ordered as to the matters so investigated, it shall furnish such public utility interested a statement notifying the public utility of the matters under investigation. Ten days after such notice has been given the commission may proceed to set a time and place for a hearing and an investigation as hereinbefore provided. (Mar. 4, 1913, 37 Stat. 984, ch. 150, Sec. 8, par. 45.)

**Section 43-705. Appeal to District Court from certain orders—Precedence over other civil causes—Proceeding when additional evidence proper—Statement to accompany decision—Subsequent appeals—Commission not liable for costs or damages.**

The District Court of the United States for the District of Columbia shall have jurisdiction to hear and determine any appeal from an order or decision of the Commission. Any public utility or any other person or corporation affected by any final order or decision of the Commission, other than an order fixing or determining the value of the property of a public utility in a proceeding solely for that purpose, may, within sixty days after final action by the Commission upon the petition for reconsideration, file with the clerk of the District Court of the United States for the District of Columbia a petition of appeal setting forth the reasons for such appeal and the relief sought; at the same time such appellant shall file with the Commission notice in writing of the appeal together with a copy of the petition. Within twenty days of the receipt of such notice of appeal the Commission shall file with the clerk of the said court the record, including a transcript of all proceedings had and testimony taken before the Commission, duly certified, upon which the said order or decision of the Commission was based, together with a statement of its findings of fact and conclusions upon the said record, and a copy of the application for reconsideration and the orders entered thereon: *Provided*, That the parties, with the consent and approval of the Commission, may stipulate in writing that only certain portions of the record be transcribed and transmitted. Within this period the Commission or any other interested party shall answer, demur, or otherwise move or plea. Thereupon the appeal shall be at issue and ready

for hearing. All such proceedings shall have precedence over any civil cause of a different nature pending in said court, and the District Court of the United States for the District of Columbia shall always be deemed open for the hearing thereof. Any such appeal shall be heard upon the record before the Commission, and no new or additional evidence shall be received by the said court. The said court, or any justice or justices thereof, before whom any such appeal shall be heard, may require and direct the Commission to receive additional evidence upon any subject related to the issues on said appeal concerning which evidence was improperly excluded in the hearing before the Commission or upon which the record may contain no substantial evidence. Upon receipt of such requirement and direction the Commission shall receive such evidence and without unreasonable delay shall transmit to the said court the findings of fact made thereon by the Commission and the conclusions of the Commission upon the said facts.

Upon the conclusion of its hearing of any such appeal the court shall either dismiss the said appeal and affirm the order or decision of the Commission or sustain the appeal and vacate the Commission's order or decision. In either event the court shall accompany its order by a statement of its reasons for its action, and in the case of the vacation of an order or decision of the Commission the statement shall relate the particulars in and the extent to which such order or decision was defective.

Any party, including said Commission, may appeal from the order or decree of said court to the United States Court of Appeals for the District of Columbia, which shall thereupon have and take jurisdiction in every such appeal. Thereafter the Supreme Court of the United States may, upon a petition for certiorari granted in its discretion, review the said case.

Said Commission shall not, nor shall any of its members, officers, agents, or employees, be taxed with any costs, nor shall they or any of them be required to give any supersedeas bond or security for costs or damages on any appeal whatsoever. Said Commission, or any of its members, officers, agents, or employees, shall not be liable to suit or action or for any judgment or decree for any damages, loss, or injury claimed by any public utility or person, nor required in any case to make any deposit for costs or pay for any service to the clerks of any court or to the marshal of the United States. (Mar. 4, 1913, 37 Stat. 989, ch. 150, sec. 8, par. 65; Aug. 27, 1935, 49 Stat. 882, ch. 742, sec. 2.)

#### **Section 43-706. Appeal limited to questions of law.**

In the determination of any appeal from an order or decision of the Commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary, or capricious. (Mar. 4, 1913, 37 Stat. 989, ch. 150, sec. 8, par. 66; Aug. 27, 1935, 49 Stat. 883, ch. 742, sec. 2.)

#### **Section 44-201. Competing lines—Certificates of convenience and necessity.**

No competitive street railway or bus line, that is, bus or railway line for the transportation of passengers of the character which runs over a given route on a fixed schedule, shall be established without the prior issuance of a certificate by the Public Utilities Commission of the District of Columbia to the effect that the competitive line is necessary for the convenience of the public. (Jan. 14, 1933, 47 Stat. 760, ch. 10, sec. 4.)



**RULES**

**Rule 75(g), Federal Rules of Civil Procedure. Record on Appeal to a Court of Appeals.**

**Record to be Prepared by Clerk—Necessary Parts.** The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court, a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof when a copy is required by the rules of the court of appeals. The copy of the transcript filed as provided in subdivision (b) of this rule shall be certified by the clerk as a part of the record on appeal and the clerk may not require an additional copy as a requisite to certification. (As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.)

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1951.

No. 295.

FRANKLIN S. POLLAK and GUY MARTIN, *Petitioners*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA,  
CAPITAL TRANSIT COMPANY, and WASHINGTON TRANSIT  
RADIO, INC., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals  
for the District of Columbia Circuit.

**BRIEF OF PETITIONERS IN NO. 295.**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1951.

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No. 295.

FRANKLIN S. POLLAK and GUY MARTIN, *Petitioners*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA,  
CAPITAL TRANSIT COMPANY, and WASHINGTON TRANSIT  
RADIO, INC., *Respondents*.

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On Writ of Certiorari to the United States Court of Appeals  
for the District of Columbia Circuit.

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**BRIEF OF PETITIONERS IN NO. 295.**

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This case and No. 224, in which the parties are reversed, involve different portions<sup>o</sup> of the radio programs distributed by loudspeakers in the vehicles of Capital Transit Company. No. 224 involves "commercials" and "announcements"; this No. 295 involves all other portions. Petitioners in this case (respondents in the other) make, in the main, the same constitutional objections to all portions. These objections will be set forth at length in our

brief in the other case. This brief does not restate the constitutional basis of the objections but undertakes only to show that, assuming them valid as to "commercials" and "announcements", they are also valid, with one significant qualification, as to the portions involved here—the other portions.

Petitioners in this case believe that in all probability the Public Utilities Commission, Capital Transit Company and Washington Transit Radio, Inc., are correct in asserting that if the commercials are prohibited these programs will stop entirely.<sup>1</sup> It was for that reason that the Petition for Certiorari in this No. 295 was a conditional one, requesting certiorari in this case only if it were granted in the other. But certiorari was sought here, on this conditional basis, because the portions of the programs not prohibited by the Court of Appeals—those involved here—constitute far the largest part of the programs and are open in the main to the same constitutional objections. These petitioners considered it essential that the Court should be presented with the programs as a whole, just as they are presented to the riders as a whole, free of any possible objection that in the absence of a cross petition the Court could take note of only the "commercials" and "announcements".

### OPINIONS BELOW.

The opinion and order of the District of Columbia Public Utilities Commission (R. 114) is reported in 81 P.U.R. (N.S.) 122. The opinion of the United States District Court for the District of Columbia (R. 2) dismissing the petition of appeal from the order of the Public Utilities Commission is unreported. The opinion of the United States Court of Appeals for the District of Columbia Circuit reversing the District Court (R. 124) is reported in 89 U.S. App. D.C. —, 191 F. (2d) 450.

<sup>1</sup> Page 11 of the Petition for Rehearing in Banc in the Court of Appeals (page 143 of the original transcript of record in this Court, not included in the printed transcript); Petition for Certiorari in No. 224, p. 10.



## JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 1, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and the District of Columbia Code, 1940, Title 43, § 705. Certiorari was granted in both No. 224 and No. 295 on October 15, 1951 (342 U. S. 848).

## STATEMENT OF THE CASE.

The principal facts of the case are set forth succinctly in the opinion of the court below (R. 124). They will also be set out in the briefs in No. 224.

For the purpose of this No. 295 it is necessary only to state that the judgment of the court below gave to petitioners, Franklin S. Pollak and Guy Martin, less than the full relief to which they were entitled and which they sought before the Public Utilities Commission. Before the Commission they sought an order totally prohibiting the programs in question—words and music alike (Application for Reconsideration, R. 172-173). The Court of Appeals stated in its opinion:

“This decision applies to ‘commercials’ and to ‘announcements’. We are not now called upon to decide whether occasional broadcasts of music alone would infringe constitutional rights.” (R. 136).

The judgment of the Court of Appeals remanded the cause to the District Court with directions to remand to the Commission for further proceedings in conformity with the opinion of the Court of Appeals. The Commission is thus required to prohibit only “commercials” and “announcements”. The Commission is not required to prohibit any other spoken parts of the broadcasts, if there are spoken parts not falling within the categories of “commercials” and “announcements” as those terms are used.

in the opinion.<sup>2</sup> The Commission is not required to prohibit the musical portions of the broadcasts.<sup>3</sup>

### **SPECIFICATION OF ERROR.**

The court below erred in not holding that all compulsory listening to radio broadcasts in the buses and streetcars of a transit company with a governmentally-fostered monopoly is a violation of constitutional rights of objecting passengers, and in limiting its holding to "commercials" and "announcements".

### **ARGUMENT.**

Petitioners contended before the Commission and in the courts below that constitutional rights are violated by the imposition of forced listening on the passengers of a transit company possessing a governmentally-fostered monopoly. The Court of Appeals agreed, but not to the full extent of the contentions made.

The Court of Appeals laid down the basic propositions that "Freedom of attention, which forced listening destroys, is a part of liberty essential to individuals and to

<sup>2</sup> As a matter of common understanding, a speech or a sermon would not be within the terms used by the court below. Although such matters have not formed a regular part of the transit radio broadcasts, it is a fact that the speech of General Douglas MacArthur before the United States Congress on April 19, 1951 was carried in its entirety over the transit radio system. This event was subsequent to the argument of this case in the Court of Appeals. There was never an indication to that court, either in the record or in the briefs of the parties, that a speech of any kind would ever be a part of these programs.

<sup>3</sup> The musical portions of the broadcasts are not covered by either the first or second sentence quoted above from the Court of Appeals' opinion. They are not "commercials" or "announcements", to which the Court of Appeals says its decision applies. Equally they are not "occasional broadcasts of music alone", the constitutional status of which the Court of Appeals says it is not called upon to determine; they are not "occasional" and they are not "alone". It seems clear, however, that the first sentence controls and that the musical portions of the broadcasts are not barred by the order below.

society" and that "One who is subjected to forced listening is not free in the enjoyment of all his faculties". (R. 128). If forced listening to "commercials" and "announcements" is therefore an invasion of constitutionally protected liberty, forced listening to a speech, a sermon, a roundtable discussion or an interview would be equally bad. In the circumstances of this case such textual material is as unprotected by the First Amendment as is advertising.

Similarly, broadcasts of music invade freedom of attention. The record clearly shows that music constitutes by far the greater portion of the broadcasts,<sup>4</sup> and that objections made by riders have in many cases been based upon the broadcasts as a whole, without distinction between music and words, or have been directed specifically at the music.<sup>5</sup> The objections make it clear that music, as well as words, infringes liberty in violation of the Fifth Amendment by interfering with the free use of one's faculties.<sup>6</sup>

<sup>4</sup> See testimony of Norman Reed, R. 140, 142, indicating that no more than six minutes of "announcements" would be made in any one given hour and that, with the possible exception of time devoted to station identification, time announcements and weather reports, "music occupies all the time in between the announcements or newscasts". Mr. Reed was called as a witness by Washington Transit Radio, Inc.

<sup>5</sup> The Public Utilities Commission recognized this in its opinion (R. 114, 117). The "Public Opinion Study" made for Radio Station WWDC-FM and Capital Transit Company shows objections to the broadcasts as a whole (R. 155-156). The chairman of the Public Utilities Commission stated that "a large number of people who profess to be music lovers violently object to music of this type on the ground that it violates their private rights." (R. 81). Washington Transit Radio's witness, Donald O'Neill, program director of the Franchise Division of Muzak Corporation, testified that "the average person has strong likes and dislikes in music. Furthermore, he will accept as a matter of course the music he likes but will protest vigorously that which is personally distasteful. . . . Generally speaking, people with a high musical training do not care too much for the more popular forms of music." (R. 80, 81).

<sup>6</sup> Respondents, Capital Transit Co. et al., appear to have accepted the view that if commercials are unconstitutional the music is too. On page 6, footnote 2, of their joint Petition for Rehearing in Banc, filed in the court below (page 138 of the original transcript of record in this Court, not included in the printed transcript), they

Two further contentions, not reached by the court below but to be developed by us in No. 224, are applicable also to the musical portions of these programs and to any textual portions not covered by "commercials" and "announcements".

We contend that when these programs—words or music—infringe the freedom of attention of objecting riders there is an unconstitutional taking of their property—their attention itself and the free use of their time.

Finally, we contend that these programs abridge the rights of objecting riders under the free speech guaranty of the First Amendment.<sup>7</sup> The "Public Opinion Study" and the opinion of the Public Utilities Commission show that these programs interfere with reading and conversation (R. 155, 156, 117), and the Court of Appeals specifically so states (R. 126, 129). The music, as well as the words, amounts to a "jamming" of the communications which objecting riders wish to make to each other or wish to receive from the books, magazines or newspapers which they are reading or attempting to read.

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said: "The Court has found that 'forced listening' to radio 'commercials' and announcements' deprives objecting passengers of 'liberty' without process of law, but implies that 'forced listening' to music may not so deprive an objecting passenger of 'liberty'. It is impossible to reconcile this rationale that 'forced listening' to one thing violates the Constitution, while 'forced listening' to another does not."

<sup>7</sup> There is one point of difference as to music. One of the objections to be made in No. 224 is that the First Amendment is violated, among other ways, by the drastically favored position given to whatever utterances are addressed to the captive audience—for example, statements defending transit radio itself (R. 163-4, 171-2). That objection is not applicable to the type of music usually broadcast in these programs. But if the broadcasting of General MacArthur's speech over transit radio had been followed by the repeated playing of "Old Soldiers Never Die", this objection would be applicable. Political use of music has been practised frequently in other settings. For example, during World War II, Allied stations frequently broadcast a phrase from Beethoven's Fifth Symphony as a "V for Victory" symbol to encourage Allied sympathizers in occupied Europe.



For these reasons, petitioners contend that all forced listening to transit radio is an unconstitutional interference with constitutionally protected rights, and that the Court of Appeals erred in restricting its holding to "commercials" and "announcements".

Respectfully submitted,

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February 11, 1952.

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**IN THE**

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**OCTOBER TERM, 1951.**

**No. 224**

**PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA,  
CAPITAL TRANSIT COMPANY, and WASHINGTON TRANSIT  
RADIO, INC., *Petitioners,***

**v.**

**FRANKLIN S. POLLAK and GUY MARTIN, *Respondents.***

**On Writ of Certiorari to the United States Court of Appeals  
for the District of Columbia Circuit.**

**BRIEF OF RESPONDENTS IN NO. 224.**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1951.

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No. 224

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PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA,  
CAPITAL TRANSIT COMPANY, and WASHINGTON TRANSIT  
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v.

FRANKLIN S. POLLAK and GUY MARTIN, *Respondents.*

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On Writ of Certiorari to the United States Court of Appeals  
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**BRIEF OF RESPONDENTS IN NO. 224.**

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As explained in our brief in No. 295, filed on February 11, 1952, this case and No. 295, in which the parties are reversed, involve different portions of the same radio programs distributed by loudspeakers in the vehicles of Capital Transit Company. This No. 224 involves "commercials" and "announcements"; No. 295 involves all other portions.

## OPINIONS BELOW.

The opinion and order of the District of Columbia Public Utilities Commission (R. 114) is reported in 81 P.U.R. (N.S.) 122. The opinion of the United States District Court for the District of Columbia (R. 2, 3) dismissing the petition of appeal from the order of the Public Utilities Commission is unreported. The opinion of the United States Court of Appeals for the District of Columbia Circuit reversing the District Court (R. 124) is reported in 89 U.S. App. D.C. —, 191 F. (2d) 450.

## JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 1, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and the District of Columbia Code, 1940, Title 43, § 705. Certiorari was granted in both No. 224 and No. 295 on October 15, 1951 (342 U.S. 848).

## QUESTIONS PRESENTED.

In the view of respondents, this case involves one ultimate question:

“May the Public Utilities Commission of the District of Columbia approve and uphold a requirement of the monopoly transit company that all bus and streetcar passengers must, as a condition of riding, be subjected to the loudspeaker rendition of radio programs of one radio station which the transit company has, for a money consideration, contracted to impose on the riders?”

This ultimate question turns, in our view, on the following primary questions, which we consider to be the questions presented in this case:

1. Does the loudspeaker rendition of radio programs in the buses and streetcars of a monopoly transit company

deprive respondents and other objecting riders of their liberty in violation of the Fifth Amendment to the United States Constitution by depriving them of the free use of their faculties?

2. Does this loudspeaker rendition deprive respondents and other objecting riders of property in violation of the Fifth Amendment to the United States Constitution by depriving them of the use of their time and attention, for the private benefit of others and without compensation?

3. Does this loudspeaker rendition deprive respondents and other objecting riders of their rights under the First Amendment to the United States Constitution by forcing on them speech which they do not wish to hear, by making it difficult or impossible for them to hear speech of others which they do wish to hear, by making it difficult or impossible for them to read printed words which they wish to read, by making it difficult or impossible for them to speak to others as they choose, by generally interfering with their freedom to listen or not to listen, and to read or not to read, and by the exercise of censorship, through previous restraint, over what they must hear?

### **STATEMENT OF THE CASE.**

Respondents in this case are persons who in the pursuance of their profession and otherwise, in going about from place to place in the District of Columbia, find it necessary to use the streetcars and buses of Capital Transit Company as a means of transportation.

Capital Transit Company enjoys a virtual monopoly of the public transit business between points in the District of Columbia. The only competing line is the Washington, Marlboro & Annapolis Motor Lines, Inc., which operates only in a small portion of the District (R. 39, 139). In November 1951, the latest period for which figures are available, the passengers carried by it were in the proportion of 1 to 108.4 to the passengers carried by Capital



Transit Company. With the exception of that line, there is no competing bus or street car company for transportation within the District of Columbia and anyone desiring to move about by such means of public transportation is compelled to use the vehicles of Capital Transit Company. Congress has provided that no competitive line shall be established unless the Public Utilities Commission finds that the competitive line is necessary for the convenience of the public. The Commission has apparently never made such a finding as to transportation within Washington.<sup>1</sup>

In December, 1948, Capital Transit Company entered into a contract with Washington Transit Radio, Inc. for the installation in all its buses and streetcars of radio-broadcast-receiving apparatus by means of which radio programs are received on such apparatus and disseminated throughout the buses and streetcars by means of loudspeakers (R. 144).

Washington Transit Radio, Inc. in turn has a contract with Capital Broadcasting Company, the licensee and operator of radio broadcast station WWDC-FM, covering the making of the broadcasts which are received and disseminated on the buses and streetcars (R. 84).

Time for commercial announcements on these programs is sold by Station WWDC-FM for private profit and bought by advertisers for private profit. The rates charged by Station WWDC-FM increase with the number of vehicles of Capital Transit Company equipped for radio reception (R. 143). There is a guaranteed minimum payment by Washington Transit Radio, Inc. to Capital Transit Company of \$6 per equipped vehicle per month, with a provision for additional payments based on the profits of WWDC-FM. These payments are compensation to Capital Transit Company for the receipt and dissemination of the radio programs to the riders of the streetcars and buses. (R. 143, 150).

<sup>1</sup> Further details concerning the monopoly position of Capital Transit Company are set forth in Point I in our discussion of government action.

Six loudspeakers are installed in each vehicle equipped for radio reception. They are placed and adjusted in such a way that these radio programs are uniformly distributed throughout the vehicle (R. 95-96).

By reason of the monopolistic position of Capital Transit, and by reason of the size of the District of Columbia, hundreds of thousands of persons within the District of Columbia are daily compelled to use the street cars and buses of Capital Transit Company. The Company's average week day revenue fares are approximately 1,000,000 (Monthly Report of Capital Transit Company to the Public Utilities Commission for December, 1951). It is well known that many riders using the vehicles of Capital Transit Company to and from work spend a half an hour or more in the vehicles each way.

The number of vehicles equipped for the reception of these radio broadcasts was 212 at the time of the hearing (R. 34, 37, 116). The present figure is larger but is unknown to respondents. It is the plan to install the equipment in all vehicles (R. 37, 146-147).

The sound of these programs cannot be escaped by anyone in the vehicle. This is a fact of common knowledge and is demonstrated by the objections made to these programs. The Commission's Order of Investigation of July 14, 1949 recited, as a ground for the Order, that the Commission had received a number of communications protesting these programs (R. 28). The Commission's opinion sets forth many objections to the programs raised by individuals who attended the hearing (R. 117). Testimony at the hearing by witnesses for Capital Transit Company and Washington Transit Radio, Inc. shows that the sound cannot be escaped (R. 38, 78-82, 95-96). This was shown also by a "Public Opinion Survey" made for Capital Transit Company and Washington Transit Radio, Inc. (R. 155-156). WWDC-FM has advertised that by means of these programs it is capable of "delivering a guaranteed audience" (1949 Radio Annual, 363). The audience of monopoly

transit companies receiving such programs has from the beginning been known in the trade as a captive audience (Electronics, June 1948, p. 72; Sales Management, Jan. 15, 1949, p. 94; Communications, August 1949, p. 12). A recent manual entitled "Successful Radio and Television Advertising," by E. F. Seehafer, Assistant Professor of Advertising at the University of Minnesota, and J. W. Laemmar of the J. Walter Thompson Company (McGraw-Hill Book Co., Inc., 1951), contains the following at page 46:

"Transit FM offers a guaranteed audience, for commuting is consistent and transportation figures are readily available. The transit audience is a captured audience, unable to dial other radio stations and unable to turn off the set. Potential 100 per cent effectiveness, however, may be decreased somewhat by conversation, traffic noises, and reading.

"Both this section on transit radio and the preceding section on storecasting have presented the positive side of the picture, but it must be kept in mind that neither transit radio nor storecasting enjoy universal approval. There are certain prejudices against advertising in this manner which have yet to be overcome."

Petitioners quote in their brief (Pet. Br. 5) the following statement by one of the witnesses who testified before the Commission in opposition to the broadcasts:

"I think I agree with the psychiatrist and the engineer here who said, 'you can shut off your mind to what you don't want to hear,' and therefore, I think most people shut off their minds to commercials."

The psychiatrist referred to in this statement (which is part of the certified minutes of the Public Utilities Commission physically present in this Court but not part of the record certified by the District Court to the Court of Appeals) was Dr. Winfred Overholser, Superintendent of St. Elizabeth's Hospital and former president of the

American Psychiatric Association, who was called as a witness at the hearing by respondents. His testimony was directly to the contrary of that attributed to him in the statement just quoted. He testified, among other things, to the following effect: noise is pretty much whatever sound a person finds unpleasant (Transcript of the P. U. C. Hearing, 429). Individuals vary greatly in sensitivity to noise, including music, and many take violent objection to certain types of music (Tr. 421). Individuals vary substantially in their ability to shut off attention to a noise they dislike (Tr. 422) and those who are oblivious to what is going on are a minority (Tr. 422). An objectionable noise may interfere with a particular person's reading, conversation (regardless of the volume of noise) and thinking (Tr. 422-423). Whether exposure to a noise is by choice or by compulsion is "always a factor" in determining its effect (Tr. 425).

Petitioners state (Pet. Br. 5) that the Commission found "that the hearing of Transit radio programs 'is a matter of the working of the mind' and that 'a person can differentiate between sounds or can get used to a sound and put it out of his mind.'" Examination of the Commission's Order (R. 114-120), however, indicates that it made no finding on this point, or any other.

The programs consist of commercials, "public service announcements," news reports, sports reports; weather and time reports, station identification, and music. (R. 38, 140-142). The programs are continuous, with the music occupying all the intervals between textual material (R. 142). At the time of the hearing, these programs were received from 7 A.M. to 7 P.M., Mondays through Saturdays, but not at all on Sundays (R. 38).

Objections of a wide variety have been made to these programs by riders in Capital Transit's vehicles. The above-mentioned "Public Opinion Survey" lists the following objections, among others: too much noise, confusion; want to think, read, study, relax, sleep, talk; annoying, nerve-rack-



ing, irritating; like quiet; don't like programs; resent being forced to listen; intrudes on privacy (R. 155-156). Similar objections were raised by individuals at the hearing (R. 117). Over thirty individuals in all voiced objections to the programs at the hearing.<sup>2</sup>

Respondents are among those who object to being required to listen to the programs in question. They assert that the programs make it difficult for them to read and converse and deprive them of their privacy (R. 5).

On July 14, 1949, the Public Utilities Commission of the District of Columbia published an order "that an investigation be made to determine whether or not the installation and use of radio receivers on the streetcars and buses of Capital Transit Company is consistent with public convenience, comfort and safety; . . ." (R. 28). The Commission ordered a formal public hearing upon this subject. Thereafter, on September 19, 1949, a notice of hearing was issued (R. 29). The public hearing was held over a 4-day period commencing October 27, 1949.

Respondents, as individuals and regular passengers upon the streetcars and buses of Capital Transit Company, were permitted to intervene in the proceeding before the Public Utilities Commission, under a rule of the Commission providing for intervention, with the Commission's permission, by a person who files formal application showing a "substantial interest" in the subject of the proceeding. (Rules 7.1 and 7.3 of the Commission Rules of Practice and Procedure). Respondents' applications for leave to intervene were not answered by Capital Transit Company, which was then the only other party to the investigation.

<sup>2</sup> The statement made several times by Petitioners (Pet. Br. 5, 36, 43) that only two users of Capital Transit's service "testified" as to their objections to the radio programs involves the use of the word "testify" in the sense of giving testimony under oath. The Commission, however, both at the hearing and in its Opinion, used the words "testified," "testimony" and "witness" as referring to statements of view made at the hearing by persons not under oath. This point is discussed in further detail in Point V below.

Respondents participated fully in the Commission's hearing and filed a 29-page brief with the Commission, containing lengthy and detailed proposed findings of fact and conclusions of law.

On December 19, 1949, the Public Utilities Commission entered an order stating its conclusion that the operation of the loudspeakers in the streetcars and buses was not inconsistent with public convenience, comfort and safety and ordered that the investigation be dismissed (R. 114-120). An appropriate application for reconsideration, including a supporting brief, was filed by respondents and was denied on February 15, 1950 (R. 121-122).

Thereafter respondents, in accordance with the appropriate statutory authority (D. C. Code (1940) Sec. 43-705), filed an appeal in the United States District Court for the District of Columbia (R. 4). In that proceeding Capital Transit Company and Washington Transit Radio, Inc. were permitted to intervene (R. 19); each of them and the Public Utilities Commission filed a motion to dismiss, principally upon the ground that respondents had not stated a claim upon which relief could be granted (R. 16-18).

The motions to dismiss came on for oral argument before a judge of the District Court who, after argument, granted the three motions to dismiss (R. 20-21). In an opinion from the bench the court said that the dismissal was on the ground that "basically there is no legal right of the petitioners [respondents here] . . . which has been invaded, threatened or violated by the action of the Public Utilities Commission . . ." (R. 3).

Respondents appealed to the United States Court of Appeals for the District of Columbia Circuit. That court reversed the action of the District Court and returned the case to the District Court with instructions to vacate the Commission's order and remand the case to the Commission for further proceedings in conformity with its opinion (R. 124-131). The Court of Appeals held that government action was involved (R. 127); that "Transit passengers

commonly have to hear the broadcasts whether they want to or not", (R. 126); that "One who is subjected to forced listening is not free in the enjoyment of all his faculties" (R. 128); and that the programs "deprive objecting passengers of liberty without due process of law" (R. 130). The court, however, limited its holding to "commercials" and "announcements".<sup>3</sup>

This Court granted certiorari on October 15, 1951, 342 U. S. 848. Respondents contend here, as they contended in the court below, that the forced listening which is imposed on them invades rights guaranteed them by the First and Fifth Amendments to the Constitution and that government action is involved within the meaning of the cases applying these Amendments.

### SUMMARY OF THE ARGUMENT.

*Point I.* The action here complained of is government action. A government-granted and government-protected monopoly is being exploited for a purpose foreign to its legitimate intent and in violation of rights of persons who by practical compulsion must patronize the monopoly. Further, the Government has sanctioned and approved the practices by the decision of the Public Utilities Commission in this matter.

*Point II.* Forced listening deprives objecting passengers of liberty and property without due process of law in violation of the Fifth Amendment. By depriving them of the freedom to use their faculties as they choose, it deprives them of liberty. By taking their attention and the full use of their time, it takes property. There are no countervailing rights which may be weighed against the rights of objecting passengers.

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<sup>3</sup> Respondents filed a conditional cross-petition for certiorari directed against this limitation on the court's holding, which was granted. See brief in No. 295, filed February 11, 1952.

*Point III.* The rights of objecting passengers under the free speech guaranty of the First Amendment are abridged by forced listening. The interest protected by the First Amendment is freedom of communication. Forced listening violates the First Amendment rights of objecting listeners to read, converse and think and their right not to listen. Putting the force of Government behind the communication of particular ideas to a captive audience violates the rule against previous restraints on free speech. There is no First Amendment right to utter the programs involved or of non-objecting passengers to hear them.

*Point IV.* The Public Utilities Commission had authority to consider claims of constitutional right and its dismissal of its investigation was unlawful. The Court of Appeals had power to review and set aside this erroneous action.

*Point V.* The decision of the Court of Appeals was based on facts and considerations properly before it. The court did not commit prejudicial error in mentioning matters outside of the record.

### **ARGUMENT.**

**Point A.** The action here complained of is government action.

#### **A. THE TOTALITY OF GOVERNMENT ACTION IN THIS CASE.**

Respondents contend that the practices complained of in this case violate their constitutional rights. Concededly, the guarantees of the Bill of Rights do not protect against actions of a purely private character. But no such action is involved here. Forced listening is being imposed upon respondents by government action.

"Government action", like many another in the field of constitutional law, is a concept with a practical orientation. What is government action for one purpose may not be government action for another purpose. The Court does not decide the question in a vacuum, but only in relation to



the particular problem in hand.<sup>4</sup> But the Court properly applies a broader standard where the question is one of invasion of important rights by actions which have an admixture of government power in the compulsion exercised. *Shelley v. Kraemer*, 334 U. S. 1 (1948). Nor should the Court give weight to the argument that its decision in this case (wrongly interpreted and extended by a mechanical logic repugnant to common-law principles) might later produce some untoward result. "... [H]ypothetical situations can be conjured up, shading imperceptibly from the circumstances of this case and by gradations producing practical differences despite seemingly logical extensions. But the Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.' ... " *Rochin v. California*, 342 U. S. —, — (January 2, 1952).

This case is one of those in which action, having in some formal aspects a "private" character, is nevertheless subject to constitutional restraint because the Government has lent its power to the "private" party and he has used the power to abuse important rights—rights which the Government itself could not have invaded. Cases of this sort fall generally into two classes. In one class, private action comes first and then the Government is asked to enforce or aid it, as in *Shelley v. Kraemer*, 334 U. S. 1 (1948). In the other class, the government action comes first in the form of a grant of some kind of governmental power to an individual, corporation or group, which then proceeds to abuse it. This class is illustrated by *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192 (1944) and the election cases, discussed below. The case now before the Court has the characteristics of both of these classes. In the beginning the Government granted a monopoly to the transit company to engage in mass transportation of people within Washington and over the public streets of the city. This monopoly created a compulsion upon respondents and other

<sup>4</sup> Compare *International Shoe Co. v. Washington*, 326 U. S. 310 (1945).

denizens of Washington to use the vehicles of the transit company for the purposes of transportation. Taking advantage of this compulsion, the transit company contracted with Transit Radio to sell the attention of this captive audience. Then the Government re-entered the picture, through the Public Utilities Commission, and effectively sanctioned and approved the practices complained of.

#### B. THE GOVERNMENT'S CREATION AND PROTECTION OF CAPITAL TRANSIT'S MONOPOLY.

Capital Transit Company was created by a merger of formerly independent transit lines in the District of Columbia. A statute popularly known as the Antimerger Law had previously prohibited merging. Act of March 4, 1913, Section 11, 37 Stat. 1006. The merger occurred as a specific exception to this prohibition. Congress first authorized the competing transit lines to merge, with a provision that the merger should not be effective until subsequent Congressional approval. Act of March 4, 1925, 43 Stat. 1265. A Unification Agreement was then entered into between the competing lines, providing for the formation of Capital Transit to take over their business. This agreement specifically stated:

"Fifteenth. Legislation obtained to effectuate this agreement shall contain a provision that no competitive street-railway or bus line, that is bus or railway line for the transportation of passengers of the character which runs over a given route on a fixed schedule, shall be established without the prior issuance of a certificate by the Public Utilities Commission of the District of Columbia to the effect that the competitive line is necessary for the convenience of the public."

The legislation by which Congress subsequently approved the merger set forth the Unification Agreement in full in its body and, in fulfillment of the provision just quoted, stated:

"Sec. 4. No competitive street railway or bus line, that is, bus or railway line for the transportation of passengers of the character which runs over a given route on a fixed schedule, shall be established without the prior issuance of a certificate by the Public Utilities Commission of the District of Columbia to the effect that the competitive line is necessary for the convenience of the public." January 14, 1933, 47 Stat. 760, ch. 10, § 4; D. C. Code (1940) §§ 44-201.

While the statute on its face permits the Public Utilities Commission to authorize competing transit service which it finds to be "necessary for the convenience of the public," such a showing apparently has never been made in the almost twenty years since its enactment. Capital Transit has in fact had an almost complete monopoly of mass transportation in the District of Columbia since its creation,<sup>5</sup> and it has been vigilant to call upon the regulatory agencies

<sup>5</sup> One other company (Washington, Marlboro & Annapolis Motor Lines, Inc.) is authorized to pick up and deposit passengers within the District of Columbia (R. 39). Monthly reports for November, 1951 (the latest reports available), filed with the Public Utilities Commission of the District of Columbia by W. M. & A. and Capital Transit, respectively, show that in that month W. M. & A. in all its operations, both in Maryland and in the District, carried a total of 253,929 passengers as against 27,419,503 carried by Capital Transit—a ratio of 1 to 108.4. W. M. & A.'s passenger revenue for the month was \$44,466.72 as compared to a revenue of \$2,334,479.59 for Capital Transit. W. M. & A. operates in only one area of the District of Columbia; its buses run from a terminal at 403 11th St., N. W., to Seat Pleasant, Forestville, Temple Hills, Oaklawn, Camp Springs and North Beach, all in Maryland. There are two local lines, the Bradbury Heights Local and the Suitland Local, which operate entirely within the District of Columbia. See *Re Washington, Marlboro & Annapolis Motor Lines, Inc.*, Opinion and Order No. 3088, Formal Case No. 349 (D.C. P.U.C., Sept. 19, 1946); see also R. 139. The lack of importance which Capital Transit ordinarily attaches to the W. M. & A. operations is shown by the fact that E. C. Giddings, Vice President of Capital Transit, who appeared as a witness in the Public Utilities Commission hearing in this matter, mentioned W. M. & A. only as an afterthought (R. 39).

and the courts to aid it in protecting this monopoly.<sup>6</sup> There is no reason to assume that its monopoly will not continue indefinitely.<sup>7</sup>

#### C. THE GOVERNMENTAL COMPELSION TO RIDE AND TO LISTEN.

The opposite side of this monopoly coin is compulsion to ride. The great mass of the people in the District of Columbia must utilize the vehicles of Capital Transit in going to and from their daily work and on other travels within the District, necessary or otherwise.<sup>8</sup> Economic considerations aside, traffic and parking conditions make it impossible for more than a fraction of those working or otherwise visiting the down town section to utilize private automobiles, and taxicabs, as common as they are in Washington, can carry only a small fraction of the number of per-

<sup>6</sup> See *Capital Transit Co. v. United States*, 97 F. Supp. 614 (D.C. 1951); *Capital Transit Co. v. Safeway Trails, Inc.*, C. A. No. 467-52 (U. S. Dist. Ct., D. C., 1952); *In the Matter of Anchorage Transportation Inc.*, P. U. C. Order No. 3368, Formal Case No. 376 (D. C. P. U. C., April 26, 1948).

<sup>7</sup> Petitioners suggest that Capital Transit's monopoly may disappear "tomorrow" if the Public Utilities Commission finds it in the public interest to authorize operation of a competing line (Pet. Br. 24). This suggestion has little force in the light of the fact that Capital Transit has had a monopoly for twenty years, which it has made diligent efforts to preserve. The Court must consider the realities of the situation. Cf. *United States v. Classic*, 313 U. S. 299, 318-319 (1941), where the Court in holding that the right to vote at a primary election is included in the right protected by Art. I, § 2 of the Constitution emphasized that in Louisiana the right to choose a representative is in fact controlled by the primary. Capital Transit's monopoly may some day disappear; just as the monopoly aspects of Louisiana primary elections may some day change, but while the monopoly endures the Court should recognize it as such.

<sup>8</sup> Cf. *United States v. Capital Transit Co.*, 325 U. S. 357, 359 (1945) in which the Court noted that government employees employed in the Pentagon and nearby establishments "were compelled to begin or complete their trips by utilizing buses or streetcars of Capital Transit."



sons who require transportation.<sup>9</sup> The compulsion to ride is a compulsion to hear, because one cannot ride a radio-equipped bus or streetcar and not hear. There is a direct causal relationship between the acts of the Government and the denial of the civil rights of objecting passengers; a directly stateable nexus between the government action which indisputably took place and the coercion of listening. The rider has to listen to the broadcast, because he has to ride the bus. He has to ride the bus, because it is the only bus. It is the only bus, because Congress in effect has enacted that it shall be the only bus. The rider's absence of alternative is merely another way of speaking of the company's monopoly, which is the creation of Congress.<sup>10</sup>

Petitioners attempt to minimize this aspect of the case in their brief (Pet. Br. 23-24). The monopoly issue, however, goes to the very heart of the matter. Respondents' argument is simply this: Government action is present for the purpose of applying the constitutional guarantees where a government-granted and government-protected monopoly

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<sup>9</sup> As to the expense of using a privately owned automobile: Capital Transit has over a long period carried car cards showing a saving of over \$200 a year through using its vehicles instead of a privately owned automobile. These cards show five cents a mile as the cost of operating an automobile and show, as the daily cost of parking, a much lower figure than is charged by some lots. As to the seriousness of the parking problem in downtown Washington: see generally the report to the Board of Commissioners of the District of Columbia by the Commissioners' Special Advisory Committee on Parking, dated February 8, 1952; the series of articles under the title "Progress or Decay?" in the Washington Post, beginning January 27, 1952; and a report of speeches by officials of Washington and New York City at the Washington Board of Trade, Washington Post, December 19, 1951, page 1. Many Capital Transit buses now carry on their rear ends a placard saying: "Nobody Aboard is Worried About Parking".

<sup>10</sup> It should be noted that Capital Transit refrains from imposing the broadcasts on its riders in a situation where there is competition: its contract with Washington Transit Radio, Inc., expressly reserves the right in Capital Transit to turn transit radio equipment on or off, in Capital Transit's discretion, insofar as "vehicles operating under charter" are concerned. Art. III(7), R. 148.

in an important area of modern urban life is exploited for a purpose foreign to its legitimate intent and in violation of rights of persons who by practical compulsion must patronize the monopoly.<sup>11</sup>

#### D. GOVERNMENT ACTION THROUGH ABUSE OF THE MONOPOLY POWER.

##### 1. The Railway Labor Act cases.

As a case involving the abuse of a governmentally-granted monopoly power, the present case is closely analogous to *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192 (1944). The *Steele* case involved racial discrimination by a union against certain of the railroad employees whom, under the Railway Labor Act, the union had the exclusive right to represent for collective bargaining purposes. The union had for this purpose been given a monopoly by the Government, and it had abused it, in violation of rights of the Negro employees. The Court had in mind the force of the constitutional arguments raised. Chief Justice Stone, in his opinion for the Court, remarked that, if the Railway Labor Act were construed to permit this sort of discrimination, "constitutional questions [would] arise" (323 U. S. 198). The Court, however, found it unnecessary to decide the constitutional question; instead, it construed the Railway Labor Act as prohibiting discrimination, holding that the Act could not be construed to give the union the power to act in disregard of the rights of those it represented.

The implications of the *Steele* case are clearly recognized in *Betts v. Easley*, 161 Kan. 459, 169 P. (2d) 831 (1946). That case similarly involved discriminatory action by a labor union under the Railway Labor Act. The court held

<sup>11</sup> For this reason such cases as *McIntire v. William Penn Broadcasting Co. of Philadelphia*, 151 F. (2d) 597 (C. C. A. 3d, 1945), cert. den. 327 U. S. 779 (1946) and *Picking v. Pennsylvania R. Co.*, 151 F. (2d) 240 (C. C. A. 3d, 1945), cited by petitioners (Pet. Bk. 21-22), have no relevancy to the issues before the Court.

squately that the discriminatory practices were in violation of the Fifth Amendment, and said that

“The view that the acts complained of are solely those of a ‘private association of individuals’ is wholly untenable. The acts complained of are those of an organization acting as an agency created and functioning under provisions of federal law.”

The same thought was emphasized in this Court’s decision in *American Communications Association v. Douds*, 339 U. S. 382, 401 (1950) where the Court said, with reference to collective bargaining representatives designated under statute, that

“when authority derives in part from Government’s thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.”

Just as the minority employee in the *Steele* and *Betts* cases had no choice of a bargaining representative—being bound by the acts of the agent selected by the majority of the employees and vested by statute with monopoly power—so in the instant case the passenger has no choice of a method of conveyance; and the presence of government action is much more obvious because the Government has not merely set up the monopoly condition but actively supervises the functioning of the monopoly and has passed on and sanctioned the practices complained of. The Government’s thumb on the scales is heavier here than in the field of collective bargaining.

## 2. The election cases.

Violation of constitutional rights through abuse of monopoly power in another field is shown by the decisions holding that private persons functioning as political parties are subject to the prohibitions of the Constitution under certain circumstances. *Smith v. Allwright*, 321 U. S. 649

(1943); *Nixon v. Condon*, 286 U. S. 73 (1932); *Rice v. Elmore*, 165 F. (2d) 387 (C. C. A. 4th, 1947), cert. den. 333 U. S. 875 (1948). Even though a political party for some purposes may be a mere association of private individuals, when it acts in a matter of high public interest with the aid or even acquiescence of the State its action is State action for the purpose of determining the applicability of constitutional limitations. As Mr. Justice Cardozo said in *Nixon v. Condon*, *supra*,

"The test is not whether the members of the Executive Committee [of the Texas Democratic Party] are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action." (286 U. S. 89).

### 3. The special position of Capital Transit and transportation companies generally.

The functions of a labor union are certainly not governmental in character. The functions of a political party are important to the Government, but they are not the type of function which the Government itself must carry on, see *United States v. Classic*, 313 U. S. 299 (1941). Mass transportation, however, whether carried on by private persons or by Government itself, is a matter peculiarly of governmental concern.<sup>12</sup> This has long been recognized. In 1873 this Court said that the function performed by a railroad was "that of the state" (*Olcott v. County Board of Supervisors*, 16 Wall. (83 U. S.) 678, 695; see also Mr. Justice Harlan's dissent in the *Civil Rights Cases*, 109 U. S. 3, 37-39 (1883); *Marsh v. Alabama*, 326 U. S. 501, 506 (1946) and cases cited in n. 3 of the opinion). How much more this is true of modern-day urban mass transportation is shown by the fact that in such important metropolitan cen-

<sup>12</sup> See Maelver, *The Modern State* 190 (1926).



ters as New York, Chicago, Boston, Detroit, Cleveland, San Francisco and Seattle the municipal government has taken over the operation of local transit systems.<sup>13</sup> Capital Transit itself is far too closely involved in the functioning of community life in Washington to be able to assert that its actions are merely those of a private person. The legislative history of the merger which gave birth to Capital Transit shows clearly a public concern in seeing that merger take place.<sup>14</sup> The final terms of the merger resolution were agreed upon by representatives of the utilities and other interested parties in the Senate District of Columbia Committee room.<sup>15</sup> The terms of the joint resolution relieved the transit company from the duty of paving streets and paying for traffic policemen at crossings.<sup>16</sup> The company uses streets that are a public easement as a matter of law and that are in fact kept up by public funds. Later, Capital Transit was consulted on the location of the Pentagon Building,<sup>17</sup> and its fares thereto were a factor in wartime morale among Government employees.<sup>18</sup> Capital Transit is a private corporation for most purposes, but when it in-

<sup>13</sup> Taff, *Commercial Motor Transportation* 395-6 (1950); *What Are the Facts About Municipally-Owned Transit?*, 46 *Bus Transportation*, No. 1, p. 2 (January 1950). This has not been done because of any hope of financial advantage to the municipality; on the contrary, deficits are common in municipal operation. *Ibid.*; see also Bauer and Costello, *Transit Modernization and Street Traffic Control* 232 (1950).

<sup>14</sup> See H. Rept. 1030, S. Rept. 691, 72d Cong., 1st Sess.: 76 Cong. Rec. 678-680, 683-686, 687-691, 737-742, 743-744, 820-822, 908-915 (1932).

<sup>15</sup> 76 Cong. Rec. 744, 820, 908 (1932).

<sup>16</sup> Jan. 14, 1933, 47 Stat. 752, 759, ch. 10, § 3 (1933).

The District of Columbia Commissioners were directed to give one of Capital Transit's predecessors an easement or right of way in connection with the straightening and shortening of Michigan Avenue. Act of March 4, 1929, 45 Stat. 154, ch. 682, § 7, D. C. Code (1940) §§ 7-131.

<sup>17</sup> Exhibit 56, Record in *United States v. Capital Transit Co.*, 325 U. S. 357 (1945), pp. 998-999 (Letter from E. D. Merrill, President of Capital Transit Company, to Gen. B. B. Somervell).

<sup>18</sup> *United States v. Capital Transit Co.*, 325 U. S. 357 (1945).

vades the rights of a captive audience which the Government has had a hand in assembling for it, it cannot be heard to say that it is only doing what any private person could do.

The fact that transportation companies and other utilities are regulated does not in itself make their acts government action. It does, however, negate any claim that a street-railway company is a private person like any other. Utilities are subject to a duty to serve the public—a duty not resting so much on any governmental grant of power as on the nature of the functions they perform.<sup>19</sup> Their peculiar character is illustrated by the recent cases involving discrimination by private action of interstate common carriers, and holding carrier regulations void as a burden on interstate commerce. (*Chance v. Lambeth*, 186 F. (2d) 879 (C. A. 4th, 1951), cert. den. 341 U. S. 941 (1951); *Whiteside v. Southern Bus Lines, Inc.*, 177 F. (2d) 949 (C. A. 6th, 1949); *Solomon v. Pennsylvania R. Co.*, 96 F. Supp. 709 (S. D. N. Y. 1951)). It has always been assumed in the decisions of this Court that the doctrine of unconstitutional burden on interstate commerce is directed only against state action of some sort (*Morgan v. Virginia*, 328 U. S. 373, 377 (1946); *Marsh v. Alabama*, 326 U. S. 501, 506 (1946); *Chiles v. Chesapeake & Ohio R. Co.*, 218 U. S. 71 (1910)). The *Chance*, *Whiteside* and *Solomon* cases go beyond the holding of the *Morgan* case, finding that purely private action can amount to an unconstitutional burden on interstate commerce. At the least, these cases strikingly illustrate the public character of common carriers and the trend toward broadening of the concept of government action. When there is added to this inherent public character a government-granted and government-protected monopoly, a compulsion to ride the vehicles of the transit company, an abuse of this monopoly by exploiting the captive audience thus created, an upholding of the practice by the regulatory

<sup>19</sup> See Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 Harv. L. Rev. 156, 217 (1904).

agency of the Government, we have a proper case for applying "the great restraints of the Constitution".

The holding of the court below on the government-action point is anticipated in several decisions of lower courts. In *Nash v. Air Terminal Services*, 85 F. Supp. 545 (E. D. Va. 1949) the court held that a private restaurant operated in the Washington National Airport building under a concession from the federal government violated the Constitution in denying equal facilities to a Negro airline passenger, saying that: "... its restaurants are too close, in origin and purpose, to the functions of the public government to allow them the right to refuse service without good cause . . . ." In *Lawrence v. Hancock*, 76 F. Supp. 1004 (S. D. W. Va. 1948) the court held that a city could not relieve itself of the obligation not to discriminate against Negroes in the operation of a swimming pool, by leasing the pool to a private organization for a nominal consideration. The court said: "It is not conceivable that a city can provide the ways and means for a private individual or corporation to discriminate against its own citizens." (76 F. Supp. 1009). In *New Prytania Market Association v. Beoubay*, 185 So. 531 (La. App. 1939), it was held that a private corporation operating a market under lease from a city could not arbitrarily refuse to renew a stall lease; the city itself could not have acted in that fashion under the Fourteenth Amendment. A monopoly was involved, since by ordinance no private market could be located within a certain distance from the market in question. Operating a market may be a historical governmental function, but running a restaurant or maintaining a swimming pool is remote from the traditional concept of government function—far more remote than such a vital matter as mass transportation.

#### E. GOVERNMENT ACTION THROUGH APPROVAL BY THE PUBLIC UTILITIES COMMISSION.

It is clear, therefore, under the authorities thus far discussed, that the abuse of the governmentally-granted mo-

monopoly of power constitutes of itself, in the circumstances of this case, government action making applicable the guarantees of the Bill of Rights. That abuse of monopoly power, as we have said, is the heart of this case.

But the government action in this case does not stop at that. The Government has done more. It has approved this abuse of power. It has done so through its agency specifically charged with the regulation of this monopoly.

In giving its approval through the Public Utilities Commission it has done so in accordance with the procedure established for the control of this monopoly and by application of the standard prescribed by Congress for holding this monopoly within bounds:

(a) As to procedure, a definite principle is consistently set forth throughout the Act under which the Commission exercises its power. That principle is that the Commission is to regulate after the event. A public utility may in general act as to matters of service without prior Commission approval. After the event the Commission may act to review what has occurred, either on its own motion or on complaint, and the Commission may then, after hearing, order discontinuances or changes. Only in one or two instances is the utility required to obtain Commission approval before action. The procedure followed by the Commission in this case is a typical regulatory procedure.

(b) As to service (as distinguished, for example, from rates), the standard prescribed is that it shall be "safe and adequate . . . just and reasonable" (D. C. Code, 1940, Secs. 43-301, 43-414) and promote the "comfort" and "convenience of the public" (Sec. 43-208); that it shall not be "unjust, unreasonable, insufficient" (Sec. 43-411) or "uncomfortable, inconvenient" (Sec. 43-208). The Commission in its opinion (R. 116) obviously construed these provisions as amounting together to the standard which it prescribed in this case—"public convenience, comfort and safety".



What the Commission did,—notwithstanding the statutory declaration that the term “service” is used in the Act “in its broadest and most conclusive sense” (Sec. 43-104)—was to hold that the forcing of these programs on unwilling riders subjected to them by governmental action was consistent with the basic statutory requirement of “public convenience, comfort and safety”.

In so doing it put the seal of governmental approval on the use being made of the monopoly of governmental power previously granted.

If the Public Utilities Commission had decided that the broadcasts were contrary to public convenience, comfort and safety or in violation of the constitutional rights of passengers, as it should have done, then the broadcasts would have stopped. Since it decided otherwise, they have gone on. The responsible choice was the Commission's, and it cannot escape the responsibility for that choice by saying that it made none.<sup>20</sup> To suggest that a “negative” order cannot be the final step in a misuse of government power is to assert a distinction that this Court has repudiated. “. . . . An order of the Commission dismissing a complaint on the merits and maintaining the status quo is an exercise of administrative function, no more and no less, than an order directing some change in status.” *Rochester Telephone Co. v. United States*, 307 U. S. 125, 142 (1939). See also *Mitchell v. United States*, 313 U. S. 80, 92 (1941); *Henderson v. United States*, 339 U. S. 816 (1950). Even failure to enter any order may be a denial of constitutional rights. *Smith v. Illinois Bell Telephone Co.*, 270 U. S. 587 (1926). As the court below held,

<sup>20</sup> This aspect of the case is discussed from a different angle under Point IV, *infra*.

In so far as petitioners use the decision of the Commission as a shield against interference with their carrying on of the transit radio scheme, they make all the clearer that state action is involved, since their action is “sanctioned . . . by the state” and “protected . . . by some ‘shield of state law or state authority’ ” (*Civil Rights Cases*, 109 U. S. 3, 17 (1883). Cf. *Shelley v. Kraemer*, 334 U. S. 1 (1948)).

"By dismissing its investigation the Commission declined to prevent valid action of Congress from having an unintended and unnecessary result." (R. 127-8).

Since the Commission has given its approval to the arrangements for the reception of these programs, the case is, in this aspect, of a type resembling those in which government action for constitutional purposes is found to lie in a sought-for exertion of governmental power in aid of a private scheme, even in the absence of any prior governmental action. *Shelley v. Kraemer*, 334 U. S. 1 (1948).<sup>21</sup>

Also illustrative of the class of cases where private action is followed and enforced by governmental action is *Marsh v. Alabama*, 326 U. S. 501 (1946). There the Court held that the property rights of the owner of a company town did not override the right of free speech so as to permit the institution of a criminal prosecution for trespass against one who had persisted in distributing religious literature on the streets. The Court said:

"The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." (Page 506)  
 "In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental rights and the enforcement of such restraint by the application of a state statute." (Page 509)

<sup>21</sup> If the Public Utilities Commission had ruled against transit radio, as it should have, and Capital Transit had then brought an appeal to the District Court, the decision in *Shelley v. Kramer* makes it clear that no judicial relief could have been granted, since the constitutional rights of objecting passengers would have been abridged. To contend that a different result should follow because the Public Utilities Commission erred is to assert a distinction without a difference.

The acts of individuals are outside the ambit of the Constitution only so long as they are "unsupported by state authority in the shape of laws, customs or judicial or executive proceedings." *Civil Rights Cases*, 109 U. S. 3, 17 (1883).

Affirmance of the decision in this case will not have the effect—asserted by petitioners, Pet. Br. 20—of turning Capital Transit into a government agency. Nor will it raise every action of a street railway company or a railroad to the level of a constitutional issue.<sup>22</sup> All that the court below held is that when a corporation exercising a public function under a monopoly grant given it by the state and protected by the state makes direct use of the practically coercive power which its franchise gives it to force patrons to submit to an infringement of rights such as are involved here, and when the regulatory government agency upholds this practice, the courts may stop it.

**Point II. Subjecting transit passengers to forced listening deprives them of liberty and property without due process of law, in violation of the Fifth Amendment.**

#### A. LIBERTY

The imposition of forced listening under the circumstances of this case deprives the rider of the liberty of using his faculties, his conscious mind, as he chooses. This is perhaps the most basic of all liberties—the liberty which many other specifically guaranteed liberties subserve. The objecting rider is deprived of this liberty here by an invasion of his mind through his sense of hearing—an invasion which he is powerless to prevent. There is nothing new about the liberty asserted here. It is only the particular form of invasion which is new, because only recently have technology and organization, developed sufficiently to in-

<sup>22</sup> Where the Government operates a railroad or street-railway system, every action it takes is, in some sense at least, a governmental action, but not every governmental action is unconstitutional.

vade that liberty, been combined to that end with the power of the Government.<sup>23</sup>

### 1. Principles stated by this Court.

The term "liberty" as used in the Fifth and Fourteenth Amendments is one of broadest import, which for more than half a century this Court has repeatedly declared to include the liberties of mind invaded in this case.

In *Allgeyer v. Louisiana*, 165 U. S. 578, 589 (1897), this Court defined it as meaning "not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; . . ." That statement was repeated in substantially identical terms in *Grosjean v. American Press Company, Inc.*, 297 U. S. 233, 244 (1936). Not long after the *Allgeyer* case the Court said that "Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling." (*Smith*

<sup>23</sup> Baron Bramwell's remarks in his charge to the jury in *Regina v. Druitt*, 10 Cox Crim. Cas. 592, 600-601 (Central Criminal Court 1867), although uttered in a different context, are peculiarly appropriate here. He told the jury that "No right of property or capital, about which there had been so much declamation, was so sacred or so carefully guarded by the law of this land as that of personal liberty. . . . But that liberty was not liberty of the body only. It was also a liberty of the mind and will; and the liberty of a man's mind and will, to say how he should bestow himself and his means, his talents, and his industry, was as much a subject of the law's protection as was that of his body. Generally speaking, the way in which people had endeavoured to control the operation of the minds of men was by putting restraints on their bodies, and therefore we had not so many instances in which the liberty of the mind was vindicated as was that of the body. Still, if any set of men agreed among themselves to coerce that liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offence, namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they so conducted themselves."



v. *Texas*, 233 U. S. 630, 636 (1914)). In *Meyer v. Nebraska*, 262 U. S. 390, 399 (1923) the Court said:

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [Citing cases] The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."

Again, in *Palko v. Connecticut*, 302 U. S. 319, 327 (1937), the Court said, through Mr. Justice Cardozo:

"Of that freedom [freedom of thought and speech] one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. . . . So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint . . ."

The "fundamental rights to life, liberty, and the pursuit of happiness" (*Yick Wo v. Hopkins*, 118 U. S. 356, 370 (1886)) are nothing if they do not include liberty in the use of the mind.

The words of Mr. Justice Brandeis in his dissenting opinion in *Olmstead v. United States*, 277 U. S. 438, 478 (1927), though uttered in a different context, are particularly applicable here:

"The makers of the Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."<sup>24</sup>

## 2. Specific applications.

This Court has recognized the existence of the right to be let alone in a number of cases involving specific situations relevant to the present case. In *Martin v. Struthers*, 319 U. S. 141 (1943) the Court acknowledged the right of a householder to be free from unwanted intrusion upon the privacy of his home. The decision struck down the anti-canvassing ordinance involved, because it went too far in restricting the freedom of speech of the canvassers as well as the rights of those householders who wished to hear their message. The Court, however, recognized that there was a legitimate right to be protected against annoyance. As Mr. Justice Burton later said in his opinion in *Kovacs v. Cooper*, 336 U. S. 77, 86-87 (1949), the Court in the *Struthers* case "never intimated that the visitor could insert a foot in the door and insist upon a hearing". Capital Transit and Transit Radio have done more than insert a foot in the door; with the aid of the Government, they have effectively pinned the rider down and forced him to listen.

Even stronger than the *Struthers* case is the decision in *Breard v. Alexandria*, 341 U. S. 622 (1951). There the Court held constitutional an ordinance prohibiting door-to-

<sup>24</sup> Quoted in part in the unanimous opinion of the Court in *United States v. Morton Salt Co.*, 338 U. S. 632, 651 (1950).

door canvassing by salesmen soliciting subscriptions to magazines. While stating that the magazines themselves were entitled to the protection of the First Amendment, the Court said that "Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved." 341 U. S. 642.

The *Struthers* and *Brcard* cases involved an invasion of the privacy of the home and the idea that "a man's home is his castle", see concurring opinion of Mr. Justice Murphy in the *Struthers* case, 319 U. S. 141, 150. That the right to be protected against the intrusion of unwanted sounds is not limited to the home, however, is shown by *Kovacs v. Cooper*, 336 U. S. 77 (1949).<sup>25</sup> Each of the four opinions in that case spoke approvingly of the privacy of the individual or the "quiet enjoyment of home or park" or "the intolerable nuisance" which "the 'blare' of this new method of carrying ideas . . . may under certain circumstances constitute." Mr. Justice Reed, speaking for three Justices, said:

"The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loudspeakers except through the protection of the municipality." (336 U. S. 86-7).

Mr. Justice Jackson, concurring, said:

"Freedom of speech for *Kovacs* does not, in my view, include freedom to use sound amplifiers to drown out the natural speech of others." (336 U. S. 97).<sup>26</sup>

<sup>25</sup> See also *Commonwealth v. Geuss*, 168 Pa. Super. 22 (1950), aff'd per curiam 368 Pa. 290 (1951), app. dismissed on authority of *Kovacs v. Cooper*, 342 U. S. — (1952).

<sup>26</sup> See also *Kovacs v. Cooper*, 135 N. J. L. 64, 68, 50 A. (2d) 451, 453 (1946): "The freedom to express one's opinions and to invite others to assemble to hear those opinions does not contain the right to compel others to listen."

Petitioners in their brief misconstrue the holding of the court below and its reliance upon *Kovacs v. Cooper*. They state that the court below proceeded on the theory that the Constitution requires the Government to take action against disturbing noises privately caused and that it was the court's view that failure of the Government to take such action would be a deprivation of liberty without due process of law. *Kovacs v. Cooper*, however, was relied on for what it held: that the public interest in freedom from forced listening is so important as to outweigh even the public interest in making more effective, by amplifying, a communication ordinarily protected by the First Amendment. Respondents' case cannot be put in the terms used by petitioners. Respondents do not rest on any supposed duty of the Government to come in and protect them against forced listening imposed by purely private action.

No one could say that passengers in Capital Transit's vehicles could be compelled, as a condition of riding, to read one of the advertising leaflets which these vehicles carry. As the Supreme Court said in *Schneider v. Irvington*, 308 U. S. 147, 160-161 (1939), in pointing out that the constitutional liberty of distributing literature upon the streets may be regulated in the interest of other uses of the street:

"... a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet."

In effect, that is just what Capital Transit is doing to the objecting riders, who are themselves traveling on the same streets that Capital Transit is using. Capital Transit is not merely soliciting attention, as it does by the familiar "car-card" advertising posters; it compels it. The distinction is as great as between handing out leaflets and forming a cordon; between ringing the doorbell and inserting a foot in the door. The former may be innocuous; the latter is an invasion of right.



### 3. Absence of right on the part of petitioners.

Petitioners assert that Capital Transit, Transit Radio and consenting riders have rights under the First and Fifth Amendments which must be weighed against the rights of objecting passengers. These claims must be considered in the context in which they are asserted—as against the rights of a captive audience—and in that context they are not valid.

Full discussion of the free speech claims of petitioners will be deferred to a later portion of this brief in order that they may be treated at the same time as the First Amendment rights which we assert on behalf of objecting passengers. (Point III, *infra*). Briefly, it is our position that Capital Transit and Transit Radio can assert no right to free speech under the circumstances of this case because a captive audience is involved. Free speech to a captive audience is a contradiction in terms. The whole purpose of the constitutional guarantee of free speech is to keep all channels of communication open, to maintain what Mr. Justice Holmes termed the market place of ideas (dissenting opinion in *Abrams v. United States*, 250 U. S. 616, 630 (1919)). Where a single group has a monopoly of the outlet and at the same time the practical power to compel one to hear; where there is no opportunity to hear contrasting views, and where other media of communications are interfered with by the speech, there can be no First Amendment right in the speaker, and no First Amendment right of willing hearers to have the speech imposed on objectors.

Petitioners assert in passing, and without citation of authority, a claimed Fifth Amendment right to contract for the programs in question and to promulgate them. Such a right, if it could be postulated into the present circumstances, would be entirely subordinate to the superior constitutional right of objecting listeners under the First and Fifth Amendments. And plainly no one has a constitutional right to violate the constitutional rights of others.

We are well aware that the attention of streetcar passengers is subject to distraction from many other sources than these programs. We make no contention that the Government owes its citizens any duty of assuring quiet or freedom from distraction in public places in general, although the *Kovacs* case shows that the Government can assume that responsibility to some extent. What we do ask is that the power of the Government not be affirmatively used to compel subjection to distracting sounds. The fact that the deprivation of liberty complained of is a result of government action distinguishes the case from all cases of unavoidable or privately carried out distraction. An act may be entirely within the law when performed by individuals and yet, when carried out by the State, violate constitutional rights. It is no answer to the constitutional claim that the individual seeking protection from state action may have to endure a good deal of the same sort of thing through the action of private parties. Cf. *Truax v. Raich*, 239 U. S. 33 (1915); see also *McLaurin v. Oklahoma State Regents*, 339 U. S. 637, 641 (1950); *Shelley v. Kraemer*, 334 U. S. 1 (1948).

#### B. PROPERTY.

Forced listening under the circumstances of this case takes the property of objecting riders without due process of law and without compensation, for the private benefit of others. The property taken is the attention of the rider—his time, and the valuable uses to which his attention might be directed were it not for the intrusion of the broadcasts upon the consciousness.

An arbitrary taking away of time which a person desires to devote to his own use is obviously the taking of one of his most valuable properties.

That these programs do in fact deprive objecting riders of the full use of their time is plain from the record. Riders stated at the hearing that the programs "interfered with their thinking [and] reading"; that "the noise was unbear-

able"; that they were "being deprived of their property without ~~due~~ process" (R. 117). The "Public Opinion Survey" showed like objections (R. 155, 156). It is well known that many people use the hours of travel to and from work for purposes directly related to their most important activities. A student may do his lessons. A government official may study papers. A lawyer may even want to study, a brief or formulate an argument. All these activities are interfered with or prevented, not just casually and for a moment, but day after day, week after week, for periods dependent each day only on the length of time the harassed rider is compelled by the monopoly power to be subjected to the deprivation.

"Property" is a word of broad meaning, and it must be construed flexibly in accordance with the purpose of the provision in which it stands. *Lawyers Title Ins. Co. v. Lawyers Title Ins. Corp.*, 71 App. D. C. 120, 109 F. (2d) 35 (1939); *Schlaefel v. Schlaefel*, 71 App. D. C. 350, 112 F. (2d) 177 (1940). Certainly the term "property", in the context of the Fifth Amendment, covers the rights asserted here within its conventional range of reference.

This Court has specifically held that there can be a taking of property by noise in the sense of the Fifth Amendment. *United States v. Causby*, 328 U. S. 256 (1946). The same right to protection from noise has been upheld in cases brought by one user of property against another.<sup>27</sup> Basically, what is protected in these cases is the right of human beings themselves to be free from noise. The property is damaged because of what the noise does to humans. The law of privacy, once based on property right, overcame that limitation and now protects the affected personal interests directly. The Constitution is not less flexible than the law of privacy. It is capable of directly protecting those

<sup>27</sup> See *Stodder v. Rosen Talking Machine Co.*, 241 Mass. 245, 135 N.E. 251, 247 Mass. 60, 141 N.E. 569 (1922); *Fox v. Thomassie*, 26 So. (2d) 402 (La. App. 1946); *Five Oaks Corp. v. Gathmann*, 190 Md. 348, 58 A. (2d) 656 (1948).

aspects of the human personality which do in fact have financial value.

"Property is everything which has an exchangeable value." *Butchers' Benevolent Assn. v. Crescent City Livestock Landing*, 16 Wall. (U. S.) 36, 127 (1872). Only by a disregard of realities can it be argued that the attention of the transit rider is something of no value. This case would never have arisen had not the commercial interests behind transit radio felt that the attention of a captive audience was a valuable thing. The whole purpose of the contract between Capital Transit and Washington Transit Radio, Inc., and of the elaborate installation of receiving equipment in Capital Transit's vehicles, was to capture and sell the attention of the transit-riding public. Indeed, WVDC-FM, the broadcasting station involved in the scheme, has advertised that it is capable by its use of transit radio of "delivering a guaranteed audience."<sup>28</sup> The advertiser is not interested in buying the right to send sound waves from one point to another; he is buying the attention of the captive audience,—at a dollar a thousand (R. 143). To argue that the very subject matter of the contractual arrangements here involved is an ephemeral thing without any real existence is sophistry.

There is an obvious difference between transit radio and other forms of advertising, such as car-cards, magazine advertising, sky-writing, ordinary radio advertising, handbills, etc. The attention of the public may be just as valuable to the advertiser in the case of the other media; but fortunately, he cannot take it by force. Transit radio is different from every other medium—except perhaps the sound-truck, cf. *Kovacs v. Cooper*—because of the element of coercion involved. One is not required to listen to radio commercials in his home, or to read the car-cards; but the transit rider has no choice of hearing or not hearing transit radio broadcasts.

<sup>28</sup> 1949 Radio Annual 363.



**Point III.** The programs violate the rights of objecting riders under the First Amendment by forcing on them speech which they do not wish to hear, by making it difficult or impossible for them to read, and by making it difficult or impossible for them to converse with others. They also violate the principle against previous restraint. There is no First Amendment right of Capital Transit Company or Washington Transit Radio, Inc. to utter the programs or of consenting passengers to receive them.

#### A. INTRODUCTION.

We deal here with the First Amendment aspect of these programs. We undertake first to show that they violate the First Amendment rights of objecting riders. We then seek to show that the rights asserted by Capital Transit Company and Washington Transit Radio, Inc. under the First Amendment with respect to these programs, on behalf of themselves and the passengers who like them, do not exist.

There is no claim by the petitioners that the programs themselves or the exertion of governmental power which makes hearing them compulsory are in furtherance of any purpose of the Government. The claim is of purely private right.

#### B. BASIC PROPOSITIONS CONCERNING FREE SPEECH.

The interest of the speaker himself<sup>29</sup> is of great importance and is the interest which has been most frequently asserted in the courts, since it is upon the speaker that restrictions have been most frequently imposed. But the interest protected by protecting the speaker is the interest also of the listener and of society as a whole. The real interest protected by the First Amendment is freedom of communication, for the sake not of the speaker alone or

<sup>29</sup> References to a speaker include, of course, the writer and the publisher, and references to the listener include the reader.

even of the speaker and the listener but for the sake of society as a whole.<sup>30</sup> The basic assumption, as stated by Milton, Mill, Holmes and the living defenders of free speech, is that the community itself has a paramount interest in the free exchange of ideas, unhindered by governmental suppression or any governmentally established orthodoxy, and that the best test of truth is acceptance in the free market place of ideas.

Freedom of speech, therefore, in the constitutional sense is freedom of communication, of which freedom to read and to listen is an integral part. And this freedom has been most explicitly affirmed. The President, in his Proclamation of the Existence of a National Emergency, recently listed as the second of the "freedoms and rights which are a part of our way of life", enjoyed by the people of this country, "the freedom of reading and listening to what they choose."<sup>31</sup>

Freedom to listen and to read means freedom of choice in listening and reading and necessarily carries with it the freedom not to listen and not to read.<sup>32</sup> To compel a man to read or listen against his will is an abridgement of his freedom in this respect and if prolonged could amount

<sup>30</sup> See *Grosjean v. American Press Co.*, 297 U. S. 233, 243, 250 (1936); *American Communications Assn. v. Douds*, 339 U. S. 382, 395 (1950).

<sup>31</sup> Proclamation 2914, 15 Fed. Reg. 9029 (Dec. 19, 1950).

See also Ambassador Warren G. Austin's extended exposition of the United States philosophy of free speech before the First Committee of the United Nations General Assembly, in which he said: "Freedom of speech involves much more than the right to express oneself by word or in print. It is also the freedom to listen, to read, and, above all, to think for oneself . . ." 17 Dept. of State Bulletin 869 (Nov. 2, 1947).

<sup>32</sup> The right not to listen is peculiarly applicable to radio. "What is there then, if there is no free speech in radio? Free hearing. This means two things. First, that the individual is sovereign in deciding what he will listen to. With a flip of the hand he can turn off presidents, dictators, and kings. In the second place, it implies that what the individual wants to hear is on the air." Thomas Porter Robinson, *Radio Networks and the Federal Government* 85 (Columbia University Press, 1943).

to a total deprivation. Hence a speaker has no right to force his words upon an unwilling listener and the power of the Government may not be exercised, in the absence of a sufficiently important governmental purpose, to compel listening.

An explicit statement of the primacy of the right of the reader and listener is contained in William Ernest Hocking's *Freedom of the Press (A Report from the Commission on Freedom of the Press)*<sup>33</sup> (1947), in which he says:

"It is true that in all freedom of speech the listener is assumed to exist. The right to speak, as a privilege to utter words in solitude, has never been disputed, nor claimed; there are always at least two parties in the picture, though only one of them is the claimant of the right. What that claimant is interested in is the opportunity to get his ideas *across*, and into another mind, it being taken for granted that he has found or can find somebody to hear him. The speaker has no right to compel a hearing; there could be no right of free speech if there were not a corresponding right not to listen. It would hardly do to make free speech free and listening compulsory, though that might be the speaker's dream! . . ." (pp. 161-2).

<sup>33</sup> Members of the Commission on Freedom of the Press were: Robert M. Hutchins, Chairman, Chancellor, University of Chicago; Zechariah Chafee, Jr., Vice-Chairman, Professor of Law, Harvard University; John M. Clark, Professor of Economics, Columbia University; John Dickinson, Professor of Law, University of Pennsylvania, and General Counsel, Pennsylvania Railroad; William E. Hocking, Professor of Philosophy, Emeritus, Harvard University; Harold D. Lasswell, Professor of Law, Yale University; Archibald MacLeish, formerly Assistant Secretary of State; Charles E. Merriam, Professor of Political Science, Emeritus, University of Chicago; Reinhold Niebuhr, Professor of Ethics and Philosophy of Religion, Union Theological Seminary; Robert Redfield, Professor of Anthropology, University of Chicago; Beardsley Ruml, Chairman, Federal Reserve Bank of New York; Arthur M. Schlesinger, Professor of History, Harvard University; George N. Shuster, President, Hunter College.

And the whole Commission states:

"Though the issuer's interest cannot be realized without an audience, his interest carries with it no claim whatever to compel the existence of an audience but only to invite an audience from men free not to listen. Freedom of the press must imply freedom of the consumer *not to consume* any particular press product; otherwise, the issuer's freedom could be at the expense of the consumer's freedom." (p. 212).

"Hence it is that although there are these two direct interests, *only one of them, in simple conditions, needs protection*. To protect the freedom of the issuer is to protect the interest of the consumer and in general that of the community also. Hitherto in our history it has been sufficient to protect the 'freedom of the press' as the freedom of issuers.

"But, as this analysis is intended to indicate, under changed conditions the consumer's freedom might also require protection . . ." (p. 213) (italics in original)

That the interest of the listener is paramount in the concept of free speech under the First Amendment is clearly recognized in Judge Learned Hand's opinion for a three-judge district court in *National Broadcasting Co. v. United States*, 47 F. Supp. 940 (S.D.N.Y. 1942), aff'd 319 U.S. 190 (1943). It was argued there that restrictions on the relationship between broadcasting networks and affiliates were an unconstitutional abridgement of the networks' and affiliates' right of free speech. Judge Hand said:

"The [Federal Communications] Commission does therefore coerce their choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against the constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i.e., the interests, first, of the 'listeners'; next of any licensees



who may prefer to be freer of the 'networks' than they are, and last, of any future competing 'networks' . . ."  
(47 F. Supp. 946)

C. THE PROGRAMS VIOLATE THE FIRST AMENDMENT RIGHTS OF  
OBJECTING RIDERS TO READ, TO CONVERSE AND TO THINK.

The "Public Opinion Study" (R. 155-156) and the opinion of the Public Utilities Commission (R. 117) show that these programs interfere with reading, conversation and thinking. Riders objecting to the programs specifically stated among their grounds of objection that they "want to think, read, study . . . talk" (R. 155, 156). For objecting riders, the programs amount to a "jamming" of the communications which they wish to make to each other or wish to receive from books, magazines, or newspapers, as effectively as if they were designed for that purpose.

D. THE PROGRAMS VIOLATE THE FIRST AMENDMENT RIGHTS OF  
OBJECTING RIDERS BY VIOLATING THEIR FREEDOM NOT TO  
LISTEN.

Some objecting riders, as shown by the "Public Opinion Study", specifically stated that they "resent being forced to listen" (R. 156), and objectors stated at the hearing that "the practice deprived them of their right to listen or not to listen" (R. 117). Forced listening violates the First Amendment by substituting compulsion for freedom at the listener's end of the process of communication.

E. BY PUTTING THE FORCE OF GOVERNMENT BEHIND IDEAS  
CHOSEN BY PRIVATE PERSONS FOR THEIR OWN INTEREST, IN  
A SITUATION WHERE LISTENING IS COMPULSORY AND NO  
REPLY IS POSSIBLE, THE PROGRAMS VIOLATE THE BASIC  
PRINCIPLE UNDERLYING THE FIRST AMENDMENT RULE  
AGAINST PREVIOUS RESTRAINTS.

The riders in Capital Transit's vehicles are an audience assembled by the governmental force which has given to Capital Transit Company its monopoly of transportation,

and these programs are being addressed to that audience with the approval of the governmental agency charged with supervising the exercise of that monopoly. Broadcasting Station WWDC-FM, Washington Transit Radio, Inc. and Capital Transit Company share between them the power to address whatever communications they like to the audience thus assembled. Capital Transit Company has especially provided for itself two particular advantages. By its basic contract with Washington Transit Radio, Inc. it receives without charge half of the unsold commercial time for use by it for institutional and promotional announcements, subject only to approval by the broadcast station, and it has an absolute veto on any commercial continuity or any sponsor that it finds "objectionable" (Articles IV(c), (d), R. 149). "Commercial Continuity" includes announcements designed to further a philosophy as well as commercials designed to sell a product. The increasing use of paid advertisements to "sell" ideas rather than products is well known.<sup>34</sup>

This situation has the essential vice of previous restraint within the meaning of the First Amendment.

A previous restraint is, typically, a government arrangement which gives an officer of Government uncontrolled discretion to prohibit utterances. The vice of this is that the Government thereby destroys free competition in the market place of ideas. The Government itself, in the person of the officer having such uncontrolled discretion, enters the market place of ideas, excluding from it by governmental force the ideas of which it disapproves, placing behind the ideas it favors the weight of governmental approval, establishing thus an orthodox view and excluding competition with it. The view approved by the Government attains acceptance by being unchallenged, and society is molded in its thinking and its action in the image which the Government thus presents to it. This is the essence of

<sup>34</sup> Broadcasting and Telecasting, February 18, 1952, p. 34; 1951 Annual Report of Merrill Lynch, Pierce, Fenner & Beane.

dictatorship in its application to the realm of ideas, and it is not the less dictatorship where there is no governmental compulsion to listen to what is said or read what is printed.

There is probably no rule under the First Amendment which is more deeply grounded in the necessities of our society than the rule prohibiting such previous restraints. Cf. *Near v. Minnesota*, 283 U. S. 697 (1931).

The programs in this case have the essential vice of previous restraints because they are an orthodoxy established with the aid of governmental power. The three primary parties to the emission of the programs—Capital Transit, Transit Radio and WWDC-FM—have uncontrolled discretion as to what shall be said. They exclude what they like and they say what they like. The only difference is that the governmental power is exercised not at the point of utterance but upon the listener. What is not said he does not hear. What is said he must hear. From his standpoint the effect is, if anything, worse. In the traditional case of previous restraint the citizen does not have to read the book which the censor passes. The rider in the bus has to listen.

It is true that the compulsion is exercised upon the rider only while he is on the bus. When he leaves it he is a free man again, able to choose his own radio program and to read what he likes and to discover truths not presented to him by the radio station, Transit Radio, Capital Transit and the advertisers who have bought the opportunity of talking to him. But under the decisions of this Court that is a difference of no legal consequence. The rule against previous restraint does not apply merely to regulations applicable to the whole country. It applies to all officers whatsoever, no matter how small their jurisdiction. It applies to the official of Jersey City who refuses to permit the use of the streets or parks for a purpose of which he disapproves, *Hague v. C. I. O.*, 307 U. S. 496 (1939), and to the official of Lockport who refuses to permit the use of a loudspeaker, *Saia v. New York*, 334 U. S. 558 (1948). There

were other possible meeting places in Jersey City. There were other means of communication in Lockport. The previous restraint was unconstitutional nonetheless.

If differences of degree are to count at all in such matters the situation here is worse. The speakers excluded there were excluded on relatively brief occasions that happened only sporadically. The audience denied the opportunity of listening to what would have been said was an audience of necessarily shifting membership, encountering the speech casually and briefly, not certain to be exposed to it again, and limited in number to the capacity of the park or the range of the loudspeaker. Here the audience consists of hundreds of thousands of persons each working day exposed to the broadcasts (those at least who use Capital Transit's vehicles to go to or from work or on other regular weekday tasks) two hundred or more times a year.

In another respect also the situation here is worse. A public official, however unlimited his discretion, is subject to being called to account for his actions. A party aggrieved may voice his grievance through legal action, as was done in the *Hague* and *Saia* cases, or through the newspapers. Furthermore, though the official's discretion may be unlimited under the terms of the law, he will doubtless formulate some rule for himself in accordance with what he conceives to be public policy, and the rule may be ascertainable. In any event he may not be always guided by his personal interests, narrowly or broadly conceived. Here the decision is made by private parties, in ways that cannot be found out, in accordance with undisclosed standards, and really for the purpose of private profit.

We come now to a consideration of the ideas and views which the persons controlling these programs have actually put forth. The station log and the complete textual material, other than time signals, weather reports, station identification, sports and news broadcasts, of October 13, 1949 (a typical day) are in the record (R. 142-143, 156-172).



Certain of these announcements were obviously controversial in character.

This is unmistakably true of the two separate texts, each broadcast ten times, in defense of transit radio itself (R. 156-159, 163, 164):

"This program is being heard by home listeners, and in radio equipped buses and street cars, without cost to the Capital Transit Company or you. Actually advertising revenues from these programs help to pay the cost of your transit ride. This is important to you in the face of higher transit operating costs."

"These programs are being heard by our F. M. listeners at home, as well as those of you riding on Capital Transit radio-equipped street cars and buses. The receivers and speakers aboard these vehicles have been installed by Station WWDC-FM, which broadcasts these programs without cost to the Capital Transit Company."

The first of these announcements is fairly to be construed as meaning that "advertising revenues from these programs" was at that time an "important" help toward paying the cost of the ride. At that time however the revenue from the programs amounted to only six dollars per month for each of the 212 vehicles then equipped, or \$15,264 a year (R. 37, 150). This was less than one-fourteenth of one percent of the Company's gross operating revenue (\$27,000,000) for the previous year (Annual Report of Capital Transit Company for 1948), and amounted to approximately \$0.0001 (one one-hundredth of a cent) per cash fare.

The second announcement appears to be factually incorrect. The basic contract between Capital Transit and Transit Radio provides for the installation of the receivers and speakers by Transit Radio (R. 146). Station WWDC-FM is owned and operated by Capital Broadcasting Company, which is a different corporation from Washington Transit Radio, Inc.

The date on which these announcements were made, October 13, 1949, was exactly two weeks before the date

already fixed for the opening of the Public Utility Commission's hearing in this matter; that date had been fixed by the Commission's notice of hearing dated September 19, 1949 (R. 29). It is a matter of common knowledge that at the time of these two announcements there had already been widespread discussion of these programs, and the Commission's order of July 14, 1949 directing that the hearing be held stated that the Commission had received "a number of communications protesting the use of radios on the vehicles of the Company" (R. 28). It seems apparent that these announcements were made for the purpose of influencing public opinion concerning the subject matter of the hearing. It is constitutionally improper to give private persons the power to address such messages in their own interest to a captive audience.

The announcements made concerning the American Cancer Society, CARE, the United States Employment Service and safety in street-crossing and the announcements giving Capital Transit's telephone number for information on how to reach FBI tours, the Zoo and the Library of Congress (R. 161-162, 168-171) are in themselves, apart from the circumstances in which they were issued, innocuous. But they represent on the part of Capital Transit, Transit Radio and WWDC-FM a decision to speak on these subjects rather than others—to further these charities or purposes rather than others; and they effectuate that decision, in the minds of the hearers, all the more effectively because of their innocuousness on the surface. The relative merits of these charities and interests as against others is a matter as to which individuals must necessarily differ. It is constitutionally improper for the power of the Government to be used by private persons to further those chosen rather than others.

The commercials occupied far the greater part of the time filled by the textual announcements (other than the news broadcasts). Apart from any controversial material in the text of a particular commercial it is constitutionally improper for the power of the Government to be placed

behind these particular products and services rather than others.

Furthermore, advertising as a whole represents a point of view—a point of view of many facets. It is in the main the point of view of those who have commodities or services to sell; it states their views from their own standpoint; with usually only such recognition of the consumer's interest as they think profitable from their own standpoint; it inevitably implies the view that life is made fuller and happier by the purchase of things rather than, say, by the pursuit of values not so extensively dependent upon commodities. It does so not only by reasoned argument but by appeals to the emotions. Its practitioners have been called the most highly paid poets of our culture.<sup>35</sup> This is not to question the exceedingly important function which advertising performs in our economy. But we do say that it is constitutionally improper for the power of Government to be placed behind advertising and its points of view, when advertising is addressed, as here, to objecting members of a captive audience.<sup>36</sup>

<sup>35</sup> Broadcast by S. F. Hayakawa entitled "Poetry and Advertising," reported in *Advertising Age*, December 3, 1951, p. 22.

<sup>36</sup> A similar view has been expressed by a leading member of the advertising profession. Addressing the International Advertising Conference in London, England, July 9, 1951, Mr. Fairfax M. Cone, president of the advertising firm of Foote, Cone & Belding, president of The Advertising Council, Inc., and past president of the American Association of Advertising Agencies, said in part:

"Outdoor advertising, of course, is but one of our problems. And they are not all in the field of method. However let me point to one other minor one and to another major method that are our responsibility together. The first may as yet not have crept into any other corner of the world than my own. And if it hasn't I warn you to beware of it; and if it shows up—stamp it out. It is advertising to *captive audiences* by means of broadcasting in railroad terminals and public conveyances and the like—to people who have no means to turn this advertising off. An outraged public demanded and got discontinuance in one of New York's great terminals. But the bus company in at least one large city has gone to court to

The same is true of the news broadcasts. The selection of news for a two-minute broadcast necessarily represents a point of view as to the items to be selected. These are heard by the audience. The others are not. The same constitutional impropriety is present.

It is improper for the power of the Government to be invoked for compulsory indoctrination of any kind, except where some clearly valid governmental purpose is subserved.<sup>37</sup> The Government can compel children to attend school—though not necessarily a public school, *Pierce v. Society of Sisters*, 268 U. S. 510 (1925)—it can compel a citizen to listen to air-raid directions, but it cannot lend its authority to an infringement of liberty whose chief if not

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establish its right to broadcast as it chooses. And I can only hope that it will be unsuccessful.

“My hope, incidentally, is not based entirely on pity for the captive audience. I have that, to be sure. But much more important is the fact that just as advertising is an instrument of a free choice society, it should of itself offer freedom of choice: To see it or hear it. Or *not*. And to be moved by it. Or not. As anyone may desire. This is the way with advertising in newspapers and magazines, and on boardings and in handbills.” (Emphasis in original).

The address was reported in part in the New York Times, July 10, 1951, p. 37, col. 2.

<sup>37</sup> The sponsorship by the Government of a particular point of view even to a non-captive audience, is not regarded with favor. See the Federal Register Act, July 26, 1935, ch. 417, § 5, 49 Stat. 501, 44 U. S. C. § 305, which after providing in subsection (a) for the publication in the Federal Register of various classes of documents, states in subsection (b) that “In addition to the foregoing there shall also be published in the Federal Register such other documents or classes of documents as may be authorized to be published pursuant hereto by regulations prescribed hereunder with the approval of the President, but in no case shall comments or news items of any character whatsoever be authorized to be published in the Federal Register.” See also Act of October 12, 1913, ch. 32, § 1, 38 Stat. 212, 5 U. S. C. § 54 (“No money appropriated by any act shall be used for the compensation of any publicity expert unless specifically appropriated for that purpose”).



only purpose is private profit. No governmental purpose is served by the programs involved in this case.

The forced listening present here is, in a limited area and on a small scale, the very practice of forced listening which, on a far wider scale, is a basic instrument of totalitarian government.<sup>38</sup> This is plainly what was meant by the objection made at the Commission's hearing that these programs "would lead to thought control" (R. 117).<sup>39</sup>

Toleration of this practice of broadcasting to a captive audience leads to one or another of two alternatives, each equally repugnant to the basic philosophy of the First Amendment. The first alternative is regulation of the content of the programs by some agency of the Government. This would be completely contrary to our traditions, would raise grave constitutional questions, and would violate the declared policy of Congress that there shall be no censorship of radio programs. (Communications Act of 1934, Section 316, 47 U. S. C. §316).

The other alternative is to leave the control in the hands of the persons who are now exercising it—the persons who are conducting these programs in their own personal interest. A deliberate governmental decision to leave the control of such vital matters in those hands would raise

<sup>38</sup> Grandin, *The Political Use of Radio*, Geneva Studies, vol. 10, no. 3 (1939); Inkeles, *Domestic Broadcasting in the U. S. S. R.* (1949), pp. 281-2; Hill and Williams, *Radio's Listening Groups* (1941), p. 154.

<sup>39</sup> This danger is emphasized by other announcements known to us, which have been broadcast since the Commission's hearing and are therefore not in the record: General MacArthur's speech to Congress on April 19, 1951, broadcast as it was being delivered; the statement that WWDC-FM mourns for *La Prensa*,—a statement which, as made by many radio stations, was protested by the Argentine Ambassador; an anti-vivisection announcement, which was protested by the Secretary of the Medical Society of the District of Columbia; the calling upon the captive audience to join in silent prayer for our forces in Korea; an announcement of the National Foundation for Consumer Credit; and a statement critical of the decision of the court below, made a few hours after that decision was handed down, by Mr. Strouse, president of Washington Transit Radio, Inc. and general manager of WWDC-FM.

serious constitutional questions apart from the First Amendment. Compare *Tumey v. Ohio*, 273 U. S. 510 (1927). And it is a course repugnant to the First Amendment, for the reasons already indicated. Moreover it is too much to hope that any self-imposed limitations, however sincerely adopted and announced in the first instance, will withstand the pressures toward expansion which result from financial opportunities.

What Capital Transit and Transit Radio have, because of their exploitation of the captive audience, is a monopoly in mass communication—a temporary and localized monopoly, to be sure, but by no means an insignificant one, considering the number of persons who ride Capital Transit's vehicles each day. Monopoly in mass communication is disfavored in the law. *Associated Press v. United States*, 326 U.S. 1 (1945); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); see also *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470 (1939). Certainly, constitutional rights of unwilling listeners should not be overridden in order to foster such a monopoly.

~~THE~~ THERE IS NO FIRST AMENDMENT RIGHT OF CAPITAL TRANSIT COMPANY, WASHINGTON TRANSIT RADIO, I&C, OR THE CONSENTING LISTENERS TO HAVE THESE BROADCASTS CONTINUE

Petitioners assert that a right to listen to these broadcasts exists in favor of consenting riders. That contention expresses a complete misunderstanding of the right to listen. That right is a right in aid of the market-place of ideas—a right to be free from previous restraint and the governmental suppression of ideas which is incidental to previous restraint. To apply that right to these programs would be to subvert the very purpose of the right. An act of Congress explicitly sanctioning these programs would in our view be clearly unconstitutional. As the court below said, "the will of a majority cannot abrogate the constitutional rights of a minority". (R. 130)

For the same reasons, Capital Transit and Transit Radio have no First Amendment right to make these broadcasts.<sup>40</sup>

**Point IV. The Public Utilities Commission acted illegally in dismissing its investigation and thereby approving the practice complained of, and the Court of Appeals had authority to set aside such erroneous action.**

The Commission's "dismissal" of its investigation is tantamount to a specific approval of the practice. If the Commission had ruled against the programs, they would have ceased; it has not ruled against them, and they have continued. The negative form of the Commission's order is not controlling. *Mitchell v. United States*, 313 U. S. 80, 93 (1941); *Rochester Telephone Corp. v. United States*, 307 U. S. 125 (1939).

The Commission's order states that

"The investigation conducted and the evidence presented . . . must, of necessity, be considered by this Commission strictly in the light of its jurisdictional powers",

and that its powers are limited to the determination of whether or not the installation and use of radio receivers in street cars and buses "is consistent with public convenience, comfort and safety." (R. 116). It acknowledges that it has power to direct such changes in equipment "as are necessary to promote the comfort or convenience of the public." (R. 116).

The Commission's reference to its "jurisdictional powers" apparently was intended as a declaration by it that the arguments of constitutional right advanced by respondents could not be considered by the Commission under the heading of "public convenience, comfort and safety."

<sup>40</sup> In the light of the foregoing analysis it is unnecessary to develop the argument that a special infirmity attaches to the commercials under the rule of *Valentine v. Christensen*, 316 U. S. 52 (1942).

This amounts to a contention by the Commission that the broadcasts can be "consistent with public convenience, comfort and safety" even though they interfere with the right of the riders, under the First Amendment, not to listen; even though they deprive the riders of liberty under the Fifth Amendment; even though they take the private property of riders for private use and without compensation in violation of the Fifth Amendment; and even though they violate the right of privacy and the ordinary duty of a common carrier to its passengers. We contend that such a view of the Commission's powers is repugnant to common sense and a clear misconstruction of the Commission's statutory authority.

The Act governing the Commission and appeals from its decisions makes it perfectly clear that constitutional questions are not, as such, beyond the Commission's powers. Paragraph 64 of the Act (D. C. Code (1940) § 43-704) says that "no . . . person . . . shall in any court urge or rely on any ground" not set forth in an application to the Commission for reconsideration. Paragraph 66 (§ 43-706) says that on any appeal from the Commission "the review by the court shall be limited to questions of law, including constitutional questions." The constitutional questions, therefore, must have been raised before the Commission to be available in court on appeal. Hence, they are not, simply as constitutional questions, beyond the Commission's jurisdiction. The Commission is empowered to compel every public utility to comply with law (Paragraph 4, D. C. Code (1940) § 43-303) and it can hardly be contended that the Commission lacked "jurisdiction" to stop the forced listening, under the standard of public convenience, comfort and safety, if it offended constitutional rights.<sup>41</sup>

<sup>41</sup> The Commission, at approximately the same time, did in fact consider and pass upon a consumer's constitutional claim in *In the Matter of Katz*, 80 P. U. R. (N.S.) 76 (D.C. P.U.C., 1949).



The Commission cannot conclusively determine the constitutional rights of citizens. Its determinations are always open to review on matters of law, and it made no findings of fact (R. 114-120). Requiring the Commission to proceed in accordance with the law and to recognize constitutional rights is no intrusion on its legislative functions. This case was not an occasion for the exercise of expertise or discretion by the Commission. The Government is collecting customers for Capital Transit for one purpose—the purpose of transportation. Capital Transit has no right to exploit them for another purpose, and it was the duty of the Commission to stop it from doing so.

Vacation of the Commission's order and remand to the Commission for further proceedings was clearly within the power of the District Court and hence of the Court of Appeals. *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 373-4 (1939); *Federal Power Commission v. Pacific Power & Light Co.*, 307 U. S. 156, 159-160 (1939). To say that respondents cannot secure relief in this proceeding but "must institute another and distinct proceeding, would be to put aside substance for needless ceremony." *Smith v. Illinois Bell Telephone Co.*, 270 U. S. 587, 591 (1926).

**Point V. The decision of the Court of Appeals was based on facts and considerations properly before it.**

The petitioners contend (Pet. Br. 41-45) that the Court of Appeals, relying heavily on the "emotional overtones inherent in this case", went outside the record in four instances to sustain its opinion. Petitioners do not argue that any of the alleged departures from the record was on a matter essential to the conclusions stated by the court. They merely claim generic error and contend that "... it cannot be presumed that its error in this regard is without significance."

Rhetorical or immaterial excursions outside the record in a case arising from the activities of an administrative

agency would scarcely be considered grounds for reversal of a decision of the highest court of the District of Columbia. Even so, the departures set up by the petitioners are extremely strained:

(1) *The Washington Post* poll (Pet. Br. 42-43). From the very beginning of these proceedings and at every opportunity, the petitioners have adverted to Capital Transit's so-called Public Opinion Studies (e.g., R. 155-156). They find themselves tempted almost to argue that their polls are conclusive on the courts (Pet. Br. 28, 36-31, 43). The Court of Appeals placed no reliance on the poll because it did not even touch the questions with which the court was concerned. The court mentioned the absence of any evidence "that any large group of passengers actually wish to go on being entertained by broadcasts forced upon other passengers at the cost of their comfort and freedom." A footnote at that point indicates that the court was aware indeed of the petitioner's poll and did not care for it. The footnote then makes a brief reference to a ballooning conducted by the *Washington Post* which did not claim to be scientific. Neither poll nor ballot made any difference to the Court of Appeals.

(2) *The use of adjectives and modifying expressions.* The petitioners complain that there are phrases appearing in the opinion of the Court of Appeals which the petitioners believe are not justified by the record (Pet. Br. 43). In fact, they argue, the expressions are contrary to the record. The language thus objected to says: (a) that "forced listening" is "well known"; (b) that "the record makes it plain that the loss [of freedom of attention] is a serious injury to many passengers"; and that forced listening was "proved by many witnesses".

(a) Forced listening is indeed well known, so well known and of such general interest that on June 1, 1951, when the Court of Appeals decision was announced, it was the subject of the banner page-one headline in the evening editions

of the Washington Star and the Washington Daily News and was the left-hand, page-one story of the Washington Post the following morning.

(b) An examination of the record by the Court of Appeals quite properly convinced the court that there was serious injury to many. The whole nature of the case, even as summarized by the Public Utilities Commission (R. 117), indicates that the Commission was aware of the serious injury to many.

(c) Unless we misunderstand petitioners' argument objecting to the words "many witnesses", that argument has the appearance of a quibble. The petitioners use the word "witnesses" in a technical sense as describing persons under oath. The court and the Public Utilities Commission (in its capacity as the administrative body, not as a present litigant) used the words "witnesses" and "testified" to include all who made statements received in the record and considered by the Commission (e.g., Transcript of Hearing before the Public Utilities Commission 66, 67). While it may be true that there were but two witnesses (technical) opposing transit radio, there were many witnesses (actual) who further opposed it, including 28 who went to the witness chair and stated unsworn opposition. Three citizens' associations appeared in active opposition (R. 117) as did Transit Riders' Association for its 43 members (R. 117). The "true and correct record and transcript of proceedings" certified by the Commission includes many unsworn documents (R. 174-178).

(3) *Footnote references to affidavits.* Petitioners (Pet. Br. 43) complain of footnotes 3 and 5 of the opinion of the Court of Appeals and argue that references there to respondents' supplementary application for reconsideration and the affidavits attached to it are error. The Court of Appeals referred to these papers to document the obvious facts that passengers hear the programs whether they want to or not and are a "guaranteed" audience. High appel-

late courts do not need "record citations" to enable them to refer to such matters as these.

(4) *The error in footnote 15.* The petitioners are correct (Pet. Br. 44-45) in pointing out that there is an error in footnote 15 of the opinion of the Court of Appeals. The Court there quoted the Chairman of the Public Utilities Commission. The erroneous quotation makes the Chairman appear to be asserting what he in fact denied.<sup>42</sup> This was surely an inadvertent and unintended unfairness to the Chairman and doubtless full justice would have been done him had the Public Utilities Commission in its capacity as a litigant made an appropriate motion for correction of the opinion. As much as the error is to be regretted, it makes no difference. The sentence in the opinion of the Court of Appeals to which the footnote is appended reads, "The interest of some in hearing what they like is not a right to make others hear the same thing." That sentence states a proposition of law which both petitioners and respondents are here arguing quite fully. The intruding footnote in correct form, or in erroneous form, neither supports nor contradicts the ruling of the court.

### CONCLUSION.

Important issues are involved in this case. Important values are concerned—some of the most important with which the courts can deal. The Court is not faced here

<sup>42</sup> The error first occurred in the transcript of record before the Public Utilities Commission. The error was apparently picked up by the Court of Appeals. Unfortunately, the court did not consult or note a "correction sheet" which was physically a separate document. Thus the error was a most natural one. In fact, there are two similar errors in that portion of the present record which was printed for the court below. At R. 85, the first word of Folio 385, third sentence, should be corrected from "could" to "did", and the word "in" should have been inserted as the third word in line 4, R. 86. This portion of the record was designated for printing by the petitioners and it was their responsibility to see to it that the correction sheets there applicable were effectuated. Thus they twice made the mistake that the court below made once.



with an attempt of a minority to impose its own judgment upon the public. It is faced with an attempt by a large commercial organization to use the powers of Government to invade the rights of others—individuals lacking corresponding economic strength.

Standardization of thought is something which has always been irreconcilable with American democratic ideals. The power of the state should not be employed to compel people to listen to the advertising and other matter which a particular radio station chooses to broadcast. There is nothing unreasonable about not wanting to be forced to hear this matter. It is a matter of common knowledge that tastes differ widely concerning the content of radio programming. Until now the individual listener has always retained at least a veto power, the power to turn to another station or to turn the radio off entirely. Transit radio makes him part of a captive audience and deprives him of choice.

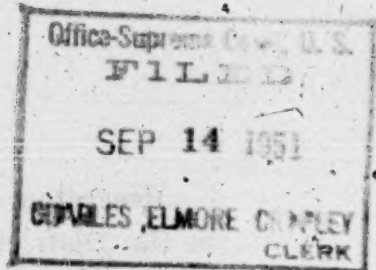
Forced listening supported by governmental action is an exercise of collective force at its most dangerous incidence—on the mind. It offends the letter as well as the spirit of the guarantees of the First and Fifth Amendments. It should not be tolerated.

Respectfully submitted,

PAUL M. SEGAL,  
JOHN W. WILLIS,  
CHARLES L. BLACK, JR.,  
HARRY P. WARNER,  
*Attorneys for Respondents.*

FRANKLIN S. POLLAK,  
*Attorney, pro se.*

February 25, 1952.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951.

No. 224.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA,  
CAPITAL TRANSIT COMPANY, AND WASHINGTON TRANSIT  
RADIO, INC., Petitioners,

v.

FRANKLIN S. POLLAK and GUY MARTIN, Respondents.

## MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*.

Radio Cincinnati, Inc., KXOK, Inc. (St. Louis), and KCMO (Kansas City) respectfully move, pursuant to Rule 27, paragraph 9, of the Rules of this Court, for leave as *amici curiae* to file a brief in support of the petition for writ of certiorari in this case. Consent of the petitioners has been received. Consent of the respondents has been requested but has been refused.

The moving parties are corporations operating radio broadcasting stations in Cincinnati, St. Louis and Kansas City. They broadcast radio programs that are received in street cars and buses in those cities, in the same manner that radio programs are received in street cars and buses in the District of Columbia.

Reception of radio programs in street cars and buses in the District of Columbia, according to the decision of the Court of Appeals in this case, constitutes government action which deprives objecting passengers of liberty without due process of law, in violation of the Fifth Amendment. The Court of Appeals so decided, even though the Public Utilities Commission—charged by act of Congress with regulation of service on street cars and buses in the public interest—had conducted a hearing for four days, giving all parties an opportunity to present evidence and be heard, had found that only 3 percent of the passengers were firmly opposed to the programs, and had decided that public convenience and comfort were promoted by the programs.

Manifestly, the issue is novel, unsettled and important, and it is believed that the case should be reviewed by this Court. It is further believed that in principle the decision below is at variance with decisions of this Court relative to constitutional liberties as well as with decisions relative to regulation of service furnished by public utilities, and that the case should be reviewed on this ground also.

The interest of the moving parties in this case lies in the fact that the radio programs provided by them for reception in street cars and buses in Cincinnati, St. Louis and Kansas City are the same in general content and also in operation and effect as the radio programs received in street cars and buses in the District of Columbia. By reason of that fact the moving parties have a strong concern in the outcome of this case, the decision of which by this Court will have direct implications on their right to continue to provide radio programs for street cars and buses in the cities served by them.

In the present case the constitutional issue involves the Fifth Amendment—whether objecting passengers are

deprived of liberty by action of the Federal government. In the situation of the moving parties the constitutional question would involve the Fourteenth Amendment—whether an objecting passenger would be deprived of liberty by action of state governments. The applicable portions of the two Amendments on deprivation of liberty are similar, and the questions are closely related. The moving parties, it is submitted, should be given an opportunity to develop to the Court the important bearing which a decision on the constitutional issues involved in this case will have on their rights and on the rights of millions of bus riders throughout the country. The question has not been emphasized by the petitioners since they are primarily concerned only with rights and interests of District of Columbia bus riders under the Fifth Amendment.

WHEREFORE, it is respectfully submitted that this motion for leave to file a brief as *amici curiae* should be granted.

Respectfully submitted,

ROBERT P. PATTERSON,  
One Wall Street,  
New York,  
Attorney for RADIO CINCINNATI, INC.,  
KXOK, INC. and KCMO BROADCAST-  
ING COMPANY.



**LIBRARY**  
**SUPREME COURT, U. S.**  
**IN THE**

**Supreme Court of the United States**

**OCTOBER TERM, 1951.**

**No. 224.**

**PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA,  
CAPITAL TRANSIT COMPANY, and WASHINGTON TRANSIT  
RADIO, Inc.,**

**Petitioners,**

**v.**

**FRANKLIN S. POLLAK and GUY MARTIN,  
Respondents.**

**No. 295.**

**FRANKLIN S. POLLAK and GUY MARTIN,  
Petitioners,**

**v.**

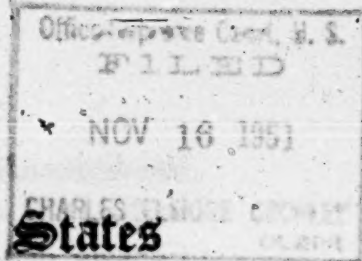
**PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA,  
CAPITAL TRANSIT COMPANY, and WASHINGTON TRANSIT  
RADIO, Inc.,**

**Respondents.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.**

**MOTION FOR LEAVE TO FILE A BRIEF AS  
AMICI CURIAE.**

Radio Cincinnati, Inc., KXOK, Inc. (St. Louis), and  
KCMO (Kansas City) respectfully move, pursuant to Rule  
27, paragraph 9, of the Rules of this Court, for leave as  
*amici curiae* to file a brief in this case urging reversal of



the decision of the Court below. Consent of the petitioners in No. 224 (respondents in No. 295) has been received. Consent of the respondents in No. 224 (petitioners in No. 295) has been requested but has been refused.

The moving parties are corporations operating FM radio broadcasting stations in Cincinnati, St. Louis and Kansas City. They broadcast radio programs that are received in street cars and buses in those cities, in the same manner that radio programs are received in street cars and buses in the District of Columbia.

The Public Utilities Commission of the District of Columbia, after investigation and formal public hearing, found that reception of radio programs in street cars and buses "tends to improve the conditions under which the public ride" and accordingly "is not inconsistent with public convenience, comfort and safety." The Court of Appeals acknowledged that the Commission, by Act of Congress, had jurisdiction and authority to fix and enforce standards of service. However, the court below found it unnecessary to decide whether the evidence supported the Commission's finding that radio broadcasts in street cars and buses are consistent with reasonable service since in its opinion these broadcasts "deprive objecting passengers of liberty without due process of law."

1. The interest of the moving parties in this case lies in the fact that the radio programs provided by them for reception in street cars and buses in Cincinnati, St. Louis and Kansas City are the same in general content and also in operation and effect as the radio programs received in street cars and buses in the District of Columbia. By reason of that fact the moving parties have a strong concern in the outcome of this case, the decision of which by this Court will have direct implications on their right to

continue to provide radio programs for street cars and buses in the cities served by them.

2. Public service commissions in Ohio, Missouri and many other states have broad authority to deal with all problems relating to service in buses and street cars, including, we believe, the problem of radio broadcasts. Over a period of many years these commissions have successfully handled similar problems—such as smoking in street cars and buses and heating and ventilation of street cars and buses—all relating to conflicting interests of passengers, without elevating them to the level of constitutional issues. Affirmance by this Court of the flat holding below that reception of radio broadcasts in street cars and buses is unconstitutional would deprive regulatory bodies in many states of the power they now have over this incident of service,—a power that has properly been committed by state legislatures to regulatory bodies.

3. In the present case the constitutional issue involves the Fifth Amendment—whether objecting passengers are deprived of liberty by action of the Federal government. In the situation of the moving parties the constitutional question would involve the Fourteenth Amendment—whether an objecting passenger would be deprived of liberty by action of state governments. The applicable portions of the two Amendments on deprivation of liberty are similar, and the questions are closely related. The moving parties, it is submitted, should be afforded an opportunity to develop to the Court the important bearing which a decision on the constitutional issues involved in this case will have on their rights and on the rights of millions of bus riders throughout the country. The question has not been emphasized by the petitioners since they are concerned

only with rights and interests of District of Columbia bus riders under the Fifth Amendment.

WHEREFORE, it is respectfully submitted that this motion for leave to file a brief as *amici curiae* should be granted.

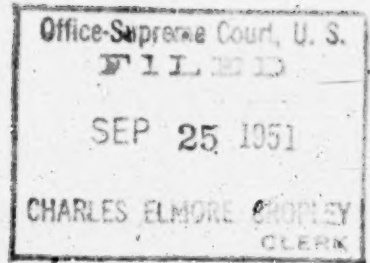
Respectfully submitted,

ROBERT P. PATTERSON,  
One Wall Street,  
New York,

Attorney for Radio Cincinnati, Inc., KXOK,  
Inc. and KCMO Broadcasting Company.



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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951

\_\_\_\_\_  
No. 224  
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PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA,  
CAPITAL TRANSIT COMPANY, AND WASHINGTON TRANSIT  
RADIO, INC., *Petitioners*,

-v-

FRANKLIN S. POLLAK AND GUY MARTIN, *Respondents*

## RESPONDENTS' OBJECTION TO MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The respondents, Franklin S. Pollak and Guy Martin, objecting to the motion filed on behalf of Radio Cincinnati, Inc., KXOK, Inc., and KCMO Broadcasting Company for leave to file a brief as *amici curiae* in support of the petition for writ of certiorari, say:

1. The motion does not allege that any fact or question of law was not adequately presented by the parties below; it does not allege any reason for believing that any fact or question of law will not be adequately presented by the parties here; and it contains nothing which would support

these allegations, had they been made. In particular, it does not suggest that the petitioners herein are not represented by competent counsel, qualified fully to present all relevant questions of fact or law. Rule 27, ¶9(c); *Northern Securities Company v. United States*, 191 U. S. 555.

2. The allegation that a decision by this Court in this case "will have direct implications" on the rights of the moving parties is one that can be made with equal truth by one person or many in innumerable cases in this Court. It cannot be sufficient under Rule 27, ¶9(c), if that provision is to have any real effect.

3. The statement in the motion that the due process clauses of the Fifth and Fourteenth Amendments are "similar" and the questions under them "closely related" is nothing more than a step toward the conclusion that the moving parties will be affected by the Court's decision here, which is not enough. The intimation, if there is one, that in substance the two clauses are relevantly different<sup>1</sup> is even further from meeting the requirements of the Rule, because if that is true the effect of this case on the moving parties will have to be settled in another case and they are not entitled to argue differences here.

4. The granting of leave to file a brief *amicus curiae* to any of the present moving parties would as a matter of precedent suggest that the same opportunity should be given to more than twenty other corporations with equivalent status. In addition to Cincinnati, St. Louis and Kansas City, there are similar transit radio operations in nine

<sup>1</sup> The moving parties state in substance (page 3) that they should be given an opportunity to show the bearing of this case "on their rights and on the rights of millions of bus riders throughout the country" under the *Fourteenth Amendment* because "the petitioners . . . are primarily concerned *only* with rights and interests of District of Columbia bus riders under the *Fifth Amendment*". (Italics ours).

other cities,<sup>2</sup> each involving an FM broadcasting station and a transportation company, each of whom, plus the transportation companies in the cities of the present moving parties, would be equally entitled to file briefs. Moreover, any of these—the moving parties or others—who might be granted permission to file briefs as *amici* at this stage would be in a position to argue that on that very ground they should be permitted to file briefs on the merits if certiorari is granted.

5. We believe that ¶9(c) of Rule 27 was adopted for the protection of litigants as well as for the protection of the Court. One of its purposes, plainly, is to protect litigants from having to deal with numerous briefs presented by persons not parties except in the situation which is expressly specified—namely, when relevant questions of fact or law will not be adequately presented by the parties themselves. Because we believe that situation does not exist here we have refused our consent under Rule 27 and now object to the motion.

Respectfully submitted,

PAUL M. SEGAL,  
816 Connecticut Avenue,  
Washington 6, D. C.,  
*Attorney for Respondents*

FRANKLIN S. POLLAK,  
1333 27th Street, N. W.,  
Washington 7, D. C.,  
*Attorney pro se.*

September 25, 1951.

<sup>2</sup> The latest data available to us show that transit radio is in operation in thirteen cities, including Washington (Broadcasting Marketbook, August 20, 1951, page 8E).

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1951

No. 224

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA,  
CAPITAL TRANSIT COMPANY, AND WASHINGTON TRANSIT  
RADIO, INC., *Petitioners*,

v.

FRANKLIN S. POLLAK AND GUY MARTIN, *Respondents*.

No. 295

FRANKLIN S. POLLAK AND GUY MARTIN, *Petitioners*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA,  
CAPITAL TRANSIT COMPANY, AND WASHINGTON TRANSIT  
RADIO, INC., *Respondents*.

On Writs of Certiorari to the United States Court of  
Appeals for the District of Columbia Circuit.

**OBJECTION TO MOTION FOR LEAVE TO FILE A  
BRIEF AS AMICI CURIAE.**

Franklin S. Pollak and Guy Martin, respondents in No. 224 and petitioners in No. 295, object to the motion of Radio Cincinnati, Inc., KXOK, Inc., and KCMO Broadcasting Company for leave to file a brief as *amici curiae* urging reversal of the decision of the Court below.



1. The motion does not allege any reason for believing that any fact or question of law will not be adequately presented by the parties here and it contains nothing which would support that allegation, had it been made. In particular, the motion does not suggest that the petitioners in No. 224 (respondents in No. 295) are not represented by competent counsel fully qualified to present all relevant questions of fact or law. Rule 27, ¶9(c); *Northern Securities Company v. United States*, 191 U. S. 555.

2. The allegation that a decision by this Court in this case "will have direct implications" on the rights of the moving parties is one that can be made with equal truth by one person or many in innumerable cases in this Court. It cannot be sufficient under Rule 27, ¶9(c), if that provision is to have any real effect.

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given to more than twenty other corporations with equivalent status. In addition to Cincinnati, St. Louis and Kansas City, there are similar transit radio operations in nine other cities,<sup>2</sup> each involving an FM broadcasting station and a transportation company, each of whom, plus the transportation companies in the cities of the present moving parties, would be equally entitled to file briefs.

5. We believe that ¶9(c) of Rule 27 was adopted for the protection of litigants as well as for the protection of the Court. One of its purposes, plainly, is to protect litigants from having to deal with numerous briefs presented by persons not parties except in the situation which is expressly specified—namely, when relevant questions of fact or law will not be adequately presented by the parties themselves. Because we believe that that situation does not exist here we have refused our consent under Rule 27 and now object to the motion.

Respectfully submitted,

PAUL M. SEGAL,

816 Connecticut Avenue,

Washington 6, D. C.,

*Attorney for Franklin S. Pollak and Guy Martin, Respondents-Petitioners,*

FRANKLIN S. POLLAK,

1333 27th Street, N. W.,

Washington 7, D. C.,

*Attorney pro se.*

November 27, 1951.

<sup>2</sup> The latest data available to us show that transit radio is in operation in thirteen cities, including Washington (Broadcasting Market-book, August 20, 1951, page 8E).